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# NATAL LAW REPORTS.

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# NATAL LAW REPORTS.

## (BEFORE A FULL BENCH.)

### MONDAY, JULY 1, 1867.

MASTER'S REPORTS.

The MASTER reported that in the estate of George Walker, of the Umvoti, farmer, a meeting of creditors had been held on the 28th June, 1867, when Peter Hellet and Alex. Martin were elected joint trustees, and had accepted the trust. The Court confirmed the appointment.

The MASTER reported that in the matter of the South African Mortgage & Investment Company *vs.* William Watson a certain portion of the erf 17 Berg-street, had been sold by public auction on 22nd June last, when the plaintiffs became the purchasers for £100. The Court confirmed the sale, and authorised the transfer of the property free from the bonds thereon.

EXECUTORSHIPS.

Mr. Justice CONNOR thought it advisable to mention to the Court that the Registrar of Deeds had applied to him in Chambers with regard to the transfer of certain property in Mr. Roach's estate. The question was this, the deceased had been married out of South Africa, and had made a will leaving half his property to his wife and the rest to his children, and the point raised was whether the executor-testamentary could dispose of any property in the estate, and in which the minors might be supposed to be interested. His Lordship had looked into Van der Linden and Van der Kessel, and the former laid down that an executor could sell "goods," but that term hardly embraced immoveable. The English law used the words "goods and chattels." A guardian of minors could not sell immoveable property without an order of Court. The question would come before the Court when the Master brought up his report in the case, as his Lordship had referred it to him to report upon. He thought the Court should be ready to decide the point, and be prepared to do so when the question should come before the Court.

LONDON AND SOUTH AFRICAN BANK *vs.* JAS. W. WINTER, and J. W. WINTER, trading as the Maritzburg Auction Company.

Mr. SHEPSTONE again appeared in this matter and applied for the compulsory sequestration of the above estates.

Mr. WALKER, for the information of the Chief Justice, who did not sit when the case came on on a previous occasion, read the affidavits of Mr. Winter, then fully referred to by us, and which were filed for the purpose of opposing the sequestration, the matter on that occasion was postponed to admit of the applicants filing answering affidavits. Mr. Walker now put in, by leave, an affidavit made by Wesley Francis with regard to the coffee account, stating that Mr. Ross, the late manager of the bank, had frequent access to the books of the Auction Company, and received information as to the sale of coffee, &c. Mr. W. referred to the fact that the defendant, trading as the Auction Company, had made a return of *nulla bona* to the writ of the Sheriff. He thought, however, that the Court would see that the return was correct when it was remembered that the whole of the assets had been handed over to Messrs. Francis and Fraser, for the purpose of paying all claims.

The CHIEF JUSTICE observed that Mr. Winter's private estate was made out to be worth £26,000, and the Auction Company to be worth from £10,000 to £12,000. This showed a surplus of about £4,000, and yet he could not pay £169.

Mr. WALKER said that was owing to the state of the country.

Mr. Justice CONNOR understood that there was an express agreement that the property held by the applicants should be realised before they proceeded further.

Mr. WALKER stated that that was the case. The argument was short, and the question was could they take the securities and keep them, not having excussed them, and at the same time sue on the notes for which they held property as security.

Mr. SHEPSTONE said that the question really was did the bank hold security? He should now proceed to read the answering affidavits. The first affidavit was that of Hugh Cameron Ross,

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late manager of the London and South African Bank in this city, which denied that there had been any understanding that no direct recourse should be had against respondent until the security deposited should have been excussed. The security was only collateral. With regard to the coffee accounnt, large advances were made by the bank in 1865 to enable respondent to purchase coffee in Rio, and the coffee being purchased had been warehoused in Smerdon's bonded warehouse in Durban, in the name of the bank, who were to be advised of all coffee delivered. Such memoranda of coffee delivered had not been rendered by Mr. Smerdon, however, and it was only in July, 1866, that he had learnt that the whole of the coffee had been delivered over to respondent without the knowledge or consent of the bank, a large amount being still due on advances made on account of purchase of coffee. There was no understanding as to an overdraft being allowed, and it was liable to be called in at any time, and as manager he (Mr. Ross) had done so before leaving the bank. The second affidavit was by John A. Runciman, acting manager of the bank, and stated that the securities mentioned had all been given in June, 1866. The security on the brig Sea Nymph was given in August, 1865, although the bond had only been signed in April last. Application had been made for an advance of £7,000 in November, 1864, in the shape of a letter of credit on Rio for the purpose of purchasing coffee. The bills of lading and insurance policies to be ceded as security to the bank. Certain promissory notes were also deposited. The cargo of coffee was, however, far the most valuable security held by the bank, and yet had been sold without the knowledge of the bank, and the proceeds not paid over, although the coffee had been lodged in Smerdon's warehouse as security, but had all been removed without the bank's knowledge or consent, and over £5,000 was now due on that account. He had never asked for a statement of respondent's affairs, but being shown one, had asked for a copy, which had been furnished. The total liability due by respondent to the bank on 21st June last, was over £14,000, and Mr. Holliday had valued the landed property as only worth about £8,500. There was no agreement that the securities should be excussed before recourse should be had against respondent. An open credit of £1,000 was never given, and although Woodhouse's agreement referred to had been ceded to the bank it was useless, as the bank had obtained nothing. Some proposition had been made that the bank should wind up the affairs of the company, but they had refused to entertain it. F. W. Wood, the inspector's affidavit next read, said that the bank had not been satisfied in the matter since June, 1866. With regard to the coffee account, respondent had acknowledged that the whole of the coffee had been sold and yet remained unpaid for, and that he had offered to pay the whole amount in instalments, but had failed to do so. That £5,000 odd was still due and interest, although respondent had stated that the coffee had sold for more than its cost price, It was true the bank had refused to discount, but the terms were that one-half of the amount so discounted should go to the payment of past due bills, and in reduction thereof. An amount of £550 bills had been put in for discount, and £251 10s. had been discounted, and the remaining bills were at too long dates to admit of discount. The bills were all made by the same party. The bills undiscounted were held as security with the concurrence of respondent. Mr. Shepstone remarked that the assets were valued at £26,000. The liabilities were £14,000 to the bank, and security was only held for about £8,500, leaving about £6,000 unsecured. Mr. Holliday had valued the landed property at about £8,500, and Capt. Bell had valued the brig Sea Nymph at £800. John R. Goodricke's affidavit stated that, on proceeding to Smerdon's warehouse, he found that 681 bags of coffee were transferred into the name of the bank, and that all had now been removed; only one lot under an order from the bank, the rest under an order from Mr. Winter.

Mr. WALKER called attention to the way in which the liabilities were increased to £14,000 by bills not yet due, and on which his client was only liable as endorser, and on which also the bank had the security of the original makers, and in many cases also of prior endorsers. It was absurd to increase the amount of the bank's claim in that way by amounts which the respondent would never be called upon to pay.

The CHIEF JUSTICE observed that by the 4th section an act of insolvency had been committed, and, whether solvent or insolvent, the act remained the same.

Mr. Justice CONNOR said the question was one of thousands of pounds, and yet £169 could not be paid; surely that was a ground for winding-up the estate in some way or other.

Mr. Justice PHILLIPS thought the question was whether security was given for this bill with others, and if collaterally or not. If it was as respondent had said the security should be first excussed before any other course was taken for the recovery of the residue.

Mr. WALKER was inclined to think that he might successfully have opposed provisional judgment on the promissory note. As to the *nulla bona* returns, it was a question as to whether any other could have been made under the circumstances.

The CHIEF JUSTICE said the Court had listened with patience to the affidavits, and there was nothing to prevent the petitioning creditor obtaining what the law entitled him to. The affidavits attempted to shew certain transactions with reference to the bank, but they appeared quite beside the question. Looking, therefore, at the affidavits, and seeing how the statements had been met, he thought the sequestration must be adjudged.

Mr. Justice CONNOR concurred in the opinion expressed by the Chief Justice. The securities deposited, if they were deeds of immoveable property, the Court had decided were worth nothing. He thought, in a case like the present, where thousands of pounds were involved, and the petitioning creditor could not get a sum of £169 paid him, it was a case for winding up the concern in one way or other.

Mr. Justice PHILLIPS concurring, the order was granted as prayed.

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THE BISHOP OF NATAL *vs.* J. H. WILLS.

The Court was very crowded with persons desirous to hear the arguments in the above matter. Before the case was proceeded with

Mr. Justice CONNOR stated that about the middle of June, on coming into Chambers, he had found a document addressed to himself, and, on opening it, found it contained an attack on what he had been reported to say on the previous hearing of this case. The attack on himself had originally been published in a newspaper, but having been extracted, was published in the form in which he had received it. (Printed on letter paper.) His Lordship said he should adopt the course adopted by him some time since, and hand the document over to the Registrar of the Court, to be filed with the papers in the case.

Mr. SHEPSTONE said he knew nothing of the papers nor who sent them.

Messrs. S. Pinsent, of Durban, and T. Shepstone, jun., appeared for the applicant, and the rev. respondent appeared in person to conduct his own case.

Mr. SHEPSTONE opened the proceedings by reading the petition and affidavit of the Bishop, and the other documents, filed on the previous hearing of the case. Mr. S. observed that their chief difficulty would have been to prove that the Church of England existed, but they had been saved the trouble of proving it by a petition filed by certain parties declaring themselves to be members of the Church of England and Ireland. Mr. S. then read the petition presented by the congregation of St. Andrew's, and referred to that signed by the congregation of St. Peter's.

Mr. Justice CONNOR said that with regard to the petitions, no leave had been given allowing the petitioners to intervene, and of course everyone would not be allowed to intervene if an order were made, which, however, was not the case. If there was any application to intervene the Court would hear it, but until the point was decided the petitions had nothing to do with the matter before the Court.

Mr. Davis said that the Court had said that any member of St. Andrew's would have liberty to address their lordships.

Mr. Justice PHILLIPS said they would not hear every person, and he did not think they should hear anyone except he appeared by counsel.

Mr. Justice CONNOR, if the parties had any right to intervene, did not see why they must of necessity be heard by counsel. No order had yet been made allowing them to intervene.

Mr. Justice PHILLIPS said that if one of the petitioners appeared he would not only appear for himself but others, and counsel could only do that.

The CHIEF JUSTICE would be inclined to hear any applicant for himself but not on behalf of others.

Mr. Justice PHILLIPS said the question was whether they should hear 40 or 50 persons or whether they should draw lots for the glory of the thing.

Mr. SHEPSTONE now put in a petition signed by 227 persons belonging to St. Andrew's and St. Peter's churches, who had contributed to the building of the churches, and the keeping them in repair, praying the Court to grant the interdict applied for :—

*In the Supreme Court of the Colony of Natal.*

In the matter of the Right Reverend John William Colenso, Doctor in Divinity Lord Bishop of Natal, applicant, and the Reverend Joseph Harris Wills, respondent.

TO THE HONORABLE THE CHIEF JUSTICE AND JUDGES OF THE SUPREME COURT OF THE COLONY OF NATAL.

The petition of the undersigned members of the United Church of England and Ireland respectfully sheweth :

1 That it has become known to your petitioners that two petitions have been presented to your Lordships' honorable Court, signed by certain persons, in the whole numbering 52, describing themselves as members of the Church of England and Ireland, praying on grounds set forth in such petitions that your honorable Court will grant "no such order as is asked for" by the Right Rev. the Lord Bishop of Natal *vs.* J. H. Wills.

2 That we, your Lordships' petitioners, are members of the United Church of England and Ireland, and "have during several years each of us for different periods used the churches called St. Peter's and St. Andrew's in our worship of Almighty God," and have some of us contributed towards the building of both or one or other of the said churches, and most, if not all of us, towards other necessary expenditure for the purposes of divine worship therein, in accordance with the rules and discipline of the said United Church of England and Ireland to which both these buildings belong.

3 That your petitioners freely admit that the signers of the two petitions to your Lordships above referred to may all of them have been at one time what they represent themselves, members of the Church of England and Ireland, but your petitioners assert that by reason of many of them having deliberately violated and practically denied the fundamental principle on which that Church is based, *e.g.*, "That the King's Majesty under God is the only supreme governor of this realm, and of all other his Highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes as temporal, and that no foreign prince, person, prelate, state, or potentate hath or ought to have any jurisdiction, power, superiority, preeminence, or authority, ecclesiastical or spiritual within his Majesty's said realms, dominions and countries," by taking part in proceedings in and about the election of a bishop for themselves, and by refusing to recognise as such the bishop appointed over them by Her Majesty the Queen, and supreme governor of the said Church, all or some of the signers of said petitions have ceased to be members of the Church of England and Ireland, and have become members of a new church, called the Church of South Africa; and that in consequence of such secession they have no right to interfere in matters connected with any land or buildings set apart for the use of or belonging to the Church of England and Ireland—to which church, as the said petitioners agree with us in averring, the buildings called St. Peter's and St. Andrew's belong. But even if the said petitioners are members of the Church of England and Ireland, we, your petitioners, say that they form but a very small proportion of the members of that church in this colony whose interests are deeply affected by the question at issue, and that they are not entitled, by reason of such insignificance, to require so vital a change to be made in the principles and government of the Church of England and Ireland as they pray your lordships to impose upon us.

We, your petitioners, therefore, as members of the said United Church of England and Ireland, humbly pray your lordships to grant the prayer of the Lord Bishop of Natal in the said cause, as being in accordance with the rules and principles of the said church, and absolutely necessary for the preservation of peace, order, and discipline in the church as it exists in the diocese, and for the prevention of unseemly brawls and breaches of the peace.

And your petitioners, as in duty bound, will ever pray.

Pietermaritzburg, Natal, June, 1867.

(Signed) ROBT. GRAY, B.D.,
A. TONNESEN,
And 225 other persons.

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The petition was verified by the affidavit of Mr. John Melville, and Mr. Shepstone remarked that the number signing the other petitions was very small when compared with those signing the petition now put in.

Mr. Justice PHILLIPS again said that he would only hear petitioners by counsel.

The CHIEF JUSTICE observed that Mr. Davis appeared for himself, and if two or three were picked out of the others, the Court would hear them. He considered that everybody thinking himself interested was entitled to pray the Court to be heard. In the case of the petition now presented he individually would allow one or two to be heard. His Lordship would be sorry for it to get abroad that where parties were interested the Court should then refuse to hear them. On the other hand, in conducting the discussion, he would only hear petitioners as far as their own interests were concerned, and they would not be allowed to act as counsel for other petitioners.

Mr. Justice CONNOR said the first question was, whether anyone should be allowed to intervene. He had very great doubt whether the members of the congregation should be allowed to intervene unless there was a pecuniary interest involved.

The CHIEF JUSTICE did not think the amount of interest mattered much. If an applicant said he was interested, his Lordship thought he was entitled to be heard, and he would allow him to intervene.

Mr. Justice CONNOR doubted if the Court took notice of anything except rights of property. In England if an application of this sort was made, the congregation would not be heard.

Mr. SHEPSTONE put in order of Court of March 15, 1866, granting applicant all powers previously possessed by him, and also asked leave to put in his own affidavit, shewing that the Bishop had enjoyed and exercised the power of inhibiting ministers as far back as 1860, when he had inhibited the Rev. R. Bramley from officiating. The letter of the Bishop was addressed to Messrs. D. B Scott and S. Williams, then churchwardens To this letter the Rev. Mr. Green replied shewing that the Bishop's inhibition was acted on. Mr. S. put in these two letters. He also stated that in 1857 the Bishop had inhibited the Rev. J. L. Crompton.

Mr. Justice CONNOR said that if the applicant relied on these facts they should have been put in the petition.

Mr. Justice PHILLIPS observed that the application was founded solely on the fact of his being Bishop, and not on the fact of his being trustee, and as such, having a right to control the use of the buildings.

Mr. SHEPSTONE said that they applied for the interdict preventing the respondent officiating without the license or permission of the Bishop. They had not raised the question of trusteeships and it would be for the opposite party to raise that question. They relied, however, simply on the fact that applicant was a Bishop of the Church of England, and, if necessary in replying, they would quote their authority.

The CHIEF JUSTICE: In whom is the title of St. Andrews?

Mr. SHEPSTONE replied that it was in the applicant, and if necessary they were prepared to argue the question of trusteeship.

The CHIEF JUSTICE said the question of trusteeship was avoided, and they had nothing to do with it.

The Rev. J. H. Wills then proceeded to address the Court. He observed that at the commencement of last term the applicant had applied for an order preventing his officiating by preaching or reading prayers in either the Cathedral Church, St. Andrew's, or any other buildings set apart for the uses of the Church of England until he should have received the bishop's license. In stating the arguments which he had been instructed to bring before the Court he must ask them to bear with him as he was wholly unaccustomed to conduct legal proceedings. He felt the utmost confidence in being able to shew the Court that the license he now held was perfectly right, and in no respect contravened the law of the land When the application was first made the question had arisen as to whether the matter was such an one as an interdict could be applied to, and it was decided that it could—the argument being closely watched to see as to whether the case could come within the limits. In the course of his argument he should refer to Voet and other authorities, to which he had been able to obtain access. Voet, book 43, title 1, section 1: From that it would be apparent that an interdict was preparatory to action, and an act of executive authority producing peace and quietness between parties until a case was heard. This would explain the case referred to, in which the Bishop of Capetown applied for an interdict against the Rev. Mr. Long. It was urged that the Bishop obtained a jurisdiction derived from letters patent, the application was, therefore, to enforce a supposed legal sentence; but the judicial committee concurred with the Supreme Court that the Court could not confer such a jurisdiction. If the jurisdiction were clear and well known to the law the Court would enforce it by an interdict or mandamus, but if it were defective it could not make up what was wanting. But the case of the Bishop of Capetown and the Rev. Mr. Long was no longer a principal case. But to return to the definition of an interdict, viz., that it was preparatory to an action; and the next question was what was required by law before an interdict could be granted. There were three requisites as laid down in Van der Linden, page 440. This dictum had been sustained by Lord Edinborough, and it had been resolutely acted upon, when but for that the Court would gladly have interfered.

Mr. Justice PHILLIPS said the difference between a mandamus and an interdict was this: a mandamus compelled a thing to be done, and was the last resort of the law, but an interdict prevented a wrong. There was, therefore, a distinction between a mandamus and an interdict.

The Rev. Mr. Wills proceeded to notice that the petition contained certain allegations that applicant was a Bishop, that he was a Bishop of the Church of England and Ireland, that he was legally so, and that he was the only such Bishop. Could the applicant make good his position and shew that he possessed such a status? Lord

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Westbury said, in the judgment in the matter of the Bishop of Natal, that the status both of the Bishops of Capetown and Natal, ecclesiastically and temporally, must be ascertained by law, and also that they were creatures of the law. He then proceeded to consider whether the constitution and law of the colony allowed of the transfer of such powers, and decided that the power of jurisdiction could not be transported here. He observed that in several colonies where the English law prevailed it did so with the exception of certain ecclesiastical jurisdiction, and in Natal the common law would prevail

The CHIEF JUSTICE observed that in Long's case the Privy Council adopted the language of Mr. Justice Watermeyer, that for the purpose of contract the laws of the Church of England would only apply as far as they were applicable to govern the question.

Rev. J. H. Wills said he should shew there had been no contract in this country. In examining the questions they must appeal to the Roman Dutch Law, Colonial Ordinances, and the letters patent in order to ascertain what force the customs, canons, &c., of the Church of England had here. He called in question the letters patent, as by sections 5, 6, and 7 of the report of the Judicial Committee in the case of the Bishop of Natal.

The CHIEF JUSTICE observed that the Cape had received Legislative Institutions in 1825, and Natal in March, 1848, and yet since those dates orders in Council of the Queen had been held to be law in the Cape Colony, amongst others several slave enactments had been passed with reference to emancipation and other legal enactments passed by the Queen with regard to slaves since 1825 the date of the granting of legislative institutions.

Rev. Mr. Wills said the language would appear sufficiently clear not to need comment. See letters patent constituting Legislative Council, dated 1847, and contained in Moodie's ordinances.

The CHIEF JUSTICE asked if the Rev. Mr. Wills intended to shew these letters patent valid, and if so why were not others valid?

Rev. Mr. Wills said that after the Legislative Council was started the Crown could not issue letters patent.

The CHIEF JUSTICE asked if it was not an absurdity that the power which created these letters patent could not issue others.

Mr. Justice CONNOR said that Rev. Mr. Wills was arguing on what the Privy Council had already decided.

The CHIEF JUSTICE said that the Rev. Mr. Wills was quoting from the letters patent which established the Legislature of this colony. He argued that they were valid, and yet before these were granted the Crown had authorised the Cape to legislate for this country. Why were one letters patent good and not another?

Mr. Justice CONNOR thought the Chief Justice was going against the decision of the Privy Council. When the Queen had given any public body the power of legislation she had taken it away from herself. These former letters patent being revoked the Crown was clear to establish the Natal legislature.

The CHIEF JUSTICE: But when these letters patent were granted there was a legislature in the colony.

Mr. Justice CONNOR said the former letters patent had been withdrawn.

Mr. Justice PHILLIPS: If the Privy Council err this Court must follow.

Rev. Mr. Wills said the letters patent of the Bishop were not valid in Natal or the Cape, but it did not follow that they were altogether worthless. It was in the power of the legislature to give them legal value, but until that was created there was no bond of obligation as between man and man. Lord Westbury had stated that to be clear from principle, and that and his cogent argument he should quote. Clear as the reason would appear, and in harmony with the judgment of the judicial committee, yet it was generally supposed that Lord Romilly, in his recent judgment *in re* Dr. Colenso *vs.* Gladstone and others, demurred to its accuracy. Lord Carnarvon, referring to the judgment, was reported to have said in the House of Lords—

Mr. Justice CONNOR said that Lord Carnarvon was no authority in a court of law. It was legal decisions that were authorities.

Rev. Mr. Wills proceeded to say that Professor Bernard, the professor of international law at Oxford, had shewn that the judgment seemed to be at variance. Lord Romilly held that the position was held by contract and consent to the jurisdiction. Lord Westbury had discussed the question as to whether the Crown could create a see, diocese, or any ecclesiastical corporation in this colony, and had decided it in the negative, and held that, after the formation of the legislature in 1847, all laws must be ordained by such legislature. Sections 3 and 6 of judgment. Lord Romilly, in arguing that the Church could exist in this colony, also based it on contract, and agreed in that point with the Privy Council, which agreed that it could not be based on the letters patent even if in the power of the Crown to issue them. Mr. W. maintained that the Crown was restrained from issuing the letters patent without a special act of parliament. Lord Westbury quoted 13 and 14 Chas. II., c. 2, by which the Crown was prevented creating any court in the British dominions having an ecclesiastical jurisdiction or authority. Now, inasmuch as the letters patent in question were occupied in setting forth the authority so possessed they were at variance with the law.

Mr. Justice PHILLIPS: They may be good in part and bad in part.

Rev. Mr. Wills said the issue of them was against English law, to which he had referred. The local legislature also could not have given effect to them because they were not lawfully issued. The applicant also tried to overcome the difficulty by appealing to the civil court. His answer was, however, that the letters patent had no force in law compelling the holder to do this or not, and also that the Crown were restrained from granting jurisdiction in ecclesiastical matters, either personal or through the civil courts. It was prevented by the act of Charles II. referred to, and on this account he argued that they had no legal force in this colony. Lord Westbury's judgment, section 29. He (Mr. W.) objected to ap-

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plicant's letters patent. To try to extend this jurisdiction to Africa would be a contravention of the law of Charles II.'s reign, as it would be giving a bishop jurisdiction in South Africa. Lord Westbury did not admit that it was done, he only called it an attempt, but said it was invalid. See 59, George III., chap. 60. With regard to the admission of parties to holy orders specially for the colonies, and in places beyond the limits of the Archbishop of Canterbury's province, this Act of Parliament was required. The resignation of the Bishop of Capetown in 1853, and the acceptance of the same by the Archbishop of Canterbury, was null and void in law, and affected many interests in the colonies. It was evident that the Archbishop had no power to touch those interests in law. It was also of no avail to argue that the act of the Archbishop was only ministerial and did not involve any claim to jurisdiction. There was nothing to shew that the Archbishop could act ministerially any more than judicially out of his own province. The act of George III was to enable him to act ministerially, not judicially, and it did not give any jurisdiction, but only legalised his acts of ordination. He could not act even ministerially without the support of an Act of Parliament. See Blackstone, vol. 1, page 182. The Bishop of Capetown resigned to the Archbishop, and therefore His Grace must have been taken to be Metropolitan in South Africa. The resignation, nevertheless, was tendered to one who could not receive it. The letters patent of the applicant were null and void because supported on the supposition that the first letters patent of the Bishop of Capetown were resigned legally. The Crown, in 1853, had been erroneously advised that the see was legally vacant, and proceeded to establish the bishopric of Natal. But the circumstances of the resignation not existing there was no foundation on which to support the superstructure. He, therefore, argued that the letters patent must be rejected on those grounds They also could not be received by the Court on other grounds. What relative superiority did the letters patent of applicant possess over those of the Metropolitan? It was argued that having received his letters patent ten days before the Bishop of Capetown, they therefore did not bind him in any way to the Metropolitan, but let them refer to section 4 of the letters patent. Now, if the Bishop of Capetown's letters patent provided for the carrying out of the provisions of the section referred to, there was manifestly no ground on which to base the objection; on the contrary, those of the present applicant were inoperative without the Metropolitan. He objected to the letters patent as beyond the prerogative of the Crown, and consequently without force in law, and unless supplemented by an act of the colonial legislature they were void. Those in this case were also bad as having been founded on a fact untrue in law, viz., the resignation of the See of Capetown. He should now test the allegations, firstly, that applicant was bishop. Could applicant satisfy the Court of that fact? There could not possibly be any reference to Roman Dutch law, the Roman civil law, nor the local ordinances, because they did not define a bishop's duties or power. The Court might say that applicant had been consecrated, and he, Mr. W., would admit it on the same grounds as the deposition of Capetown when he should find an act which canonically satisfied him that it was legal. He had found the act of one bishop null and void, and he might find the act of another also bad. He again referred to the act of George III., and asked if the Act of Parliament was necessary to enable the Archbishop to ordain a deacon was not one necessary to enable him to consecrate a bishop. There was, however, no such act, and it was not shewn when he was consecrated. He denied the authority of the Archbishop to act in this case. He made this special objection, because he found that in the lofty prerogative days of Henry VIII. an act of Parliament was passed giving leave to make bishops. The act of 31 Henry VIII., chap. 9, was repealed by Edward VI., chap. 2.

Mr. Justice PHILLIPS: The argument shews the farce of apostolical succession. It is very good.

Rev. Mr. Wills proceeded to argue that if the letters patent of Henry VIII were insufficient those of her present Majesty must be also, as the power of the Crown had been restrained and not increased since then. See 26 George III, chap. 84. There must be previous to election the king's license for election, the mandate for same, consecration, and the oaths of allegiance and supremacy. He discovered no act dispensing with all these in the case of the colonies. It might seem late to raise the questions now, but the applicant had raised them. He had called in question letters patent granted in 1853, and he (Mr. W.) only called in question those of the same date. He now asked whether the consecration which he called in question had been done. See 25 Henry VIII, chap. 60, section 6. This provided that a bishop should be enthroned and enter on his duties. The enthronement was performed by mandate to the archbishop, and was evidence of due consecration He referred to the enthronement of the Bishop of London reported in the *Guardian* of Dec. 10th, 1856. See Victoria 5, chap. 6, sec. 5. Under these circumstances must not the applicant be called upon before his status of a bishop is allowed to prove that he had been consecrated, that he also possessed the status of a bishop, and as such could ask him (Mr. W.) to receive his license. The next assertion was that he was a bishop of the United Church of England and Ireland, and two things were necessary to prove it, first, that such a church existed in the colony, secondly, that being a bishop he was bishop of that body, and unless so much was done he could not satisfy the Court that he possessed a clear right of action. He could not think that he would prove it after a letter, bearing his signature, contained in the *Mercury*, in which he asserted that there was no Church of England in Natal. The two statements appeared irreconcileable, as how could he possibly be a Bishop of a body which he said did not exist. He would proceed to examine the question closely and see by what act the institution arose in this colony. From false premises false conclusions might be drawn, and they must know what was meant by the Church of England and Ireland.

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There were one or two illustrations from Lord Romilly's judgment in the case of Colenso *vs.* Gladstone and others, page 32. Professor Bernard, in commenting on these remarks, said that Lord Romilly, in maintaining his view, says that the Episcopal Church of Scotland was obliged to reject one of the articles, but this was an error of fact. By the 11th Canon of that Church, in 1833. subscription to the whole 39 was required. Act 14. George III., chap. 83, allowed the profession of the Roman Catholic religion in Canada subject to the acknowledgment of the royal supremacy. It was an essential part of the discipline of the English Church, and secured by 24, Henry VIII., chap. 12, that an appeal should lie from the Bishop to the Metropolitan, and not from the Bishop to the Civil Court, and the deduction was that it could not exist there. If it was divested of certain rules and discipline, it would not prevail or be found here. All this was complicated by reference to the judgment of the Privy Council in the case of Long *vs* the Bishop of Capetown. Lord Kingsdowne made this observation that he would allow members of the Church of England in the colonies to make their own rules, whereas Lord Romilly required the same rules to be adhered to and adopted as at home. These authorities rendered it doubtful whether the Church of England existed out here or not, and it was difficult to say that the applicant possessed the status among them as claimed by him. Then, again, were the letters patent such as would give the status which applicant claimed. The letters patent stated for what purpose the see was formed. The purport of the interpretation put upon them was to place all the inhabitants, members of the Dutch Church, and others under the holder of the letters patent who must sustain the doctrine of the Church of England and Ireland. They stated that the inhabitants were a part of the Church of England. The letters patent did not give the status, although making applicant Bishop of Natal with a corresponding title. He really did not think that they had any such clear definition of what the Church of England was, as was required by law, or to prove that such a Church existed among them. The statute law of England did not identify the Church in the colony with the Church at home. Supposing every objection, without fail, he would yet proceed to argue that applicant did not possess the status he claimed, nor the rights appertaining to a Bishop. He would again refer to Professor Bernard's illustration. Where did applicant derive the religious position he claimed where there was no distinction of creed; certainly not from the Roman Dutch Law, which knew nothing of the Church of England, and not from the Colonial Ordinances. The applicant relied on the order in Council. Certain proceedings were taken against applicant, and the Privy Council, on being referred to, advised the Crown that, whatever effect they had, they were null and void in law. The judgment directed all parties to govern themselves accordingly, and the proceedings were said to be illegal. In the arguments which led to the conclusions of the Privy Council, so far as the legal status of applicant went it would seem to refuse him even so much as that. The Secretary of State wrote as follows on August 15, 1866. (Read letter) The order of Council could not be taken in the sense it was often taken in. In order to ascertain their true sense they were to be used as only arrived at by attaching them to matter perfectly distinct. Applicant might have a legal title but that was not a status, and also did not make him a Bishop of the United Church of England and Ireland. It was not a title he now claimed but a position. Lord Westbury said that no diocese could be laid down, but Lord Romilly contradicted that in a passage of his recent judgment. Here was a new element introduced into the colony analagous to the church at home. The Crown intended to form a diocese, placing all the inhabitants under the court of a bishop, and no mention was made of a congregational diocese, which was now said to be the only one that could exist. Lord Westbury recapitulated his phrase no diocese or sphere of action; Lord Romilly, however, concluded that he had a sphere of action. A Roman Catholic bishop here was free to exercise his functions, and the bishop of any other communion would be equally free. Every communion was free to exercise the powers essential to its members. It was not a question whether the functions could be exercised, but whether they could either by law or contract. He drew the conclusion that the status of applicant as a legal bishop could not be sustained, although it was extremely difficult to prove the negative. He would observe that if one part of the assertion was correct the other could not be, for if he be a bishop he could be the only one empowered to exercise episcopal functions in this diocese, whether under the letters patent or not. Blackstone, Vol. I., pages 11 and 380. It was evident that Blackstone assigned to archbishops and bishops episcopal functions. If the applicant was a bishop, as stated in his affidavit, there must be a metropolitan, and as such he had episcopal power within the diocese. They would arrive at the same conclusion on reading the 11th section of the letters patent. He had now pointed out the functions of archbishops. See Burns on Bishops, vol. 1, sec. 7. If those laws prevailed here, it was clear that the applicant was not the only bishop possessing ecclesiastical power, and could not be alone in possessing episcopal authority If the law was any good a bishop must be subject to a metropolitan. He would quote the admission of applicant contained in *Witness* of June 4, 1867. It was manifest that applicant allowed that another bishop could exercise and possess authority among them. He had argued that applicant, being a creature of English law, his consecration was not valid, not being capable of being brought under the Act of Parliament. It was very doubtful whether the Church of England existed in this colony, and no definition had been furnished the Court whereby it could be identified. The Court could not decide whether the applicant was a bishop. The Dean of Maritzburg thought he was in the Church, and the applicant said he had seceded, and it was extremely necessary that the Court should know what the Church of England was so that their Lordships might be unanimous in their describing the Church as a voluntary association, but the letters patent did not say so, but

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placed him over all the inhabitants The Acts of Parliament mentioned the Church of England distinctly by itself. Applicant claimed the status of being lawful bishop, but all the judges concurred in saying that the members of the Church of England could only join themselves together, but not on a basis derived from the law, whilst the assertion that he was only bishop was fatal to his claim. The law of the universal Church was against it; the constitution of the English Church was against it; and the letters patent were of no value. The applicant should be under the jurisdiction of the Metropolitan. It had been assumed that an ecclesiastical right of action could not be based on an assumption, but the prayer must be proved before it could be granted, and this could not be proved except on more elaborate proceedings than by affidavit. Applicant having assumed a certain status claimed authority over certain buildings set apart for the uses of the Church of England. The connecting link with regard to the buildings was, however, wanting. They were said to be set apart, but how, by whom, and for what end. It would be necessary to satisfy the Court on these heads. The bench had raised the point when the rule *nisi* was applied for, declaring themselves in doubt as to whether applicant sought the order as bishop or trustee. He could not find the office of trustee alleged in the affidavit, and that was all that was before the Court, and if it was urged he would demur that it did not appertain to the office of a bishop to be a trustee in England, and that he was very rarely so, although, as a matter of fact, he might have been so. Applicant must prove what was meant by the setting apart referred to, as it might be null and void. The Court must be satisfied as to all these proceedings. There might be a clear right of action under the title deeds of lands which were held in trust for the use of the English Church. Among the many legal questions this was one on which he had laid great stress, that variation of name signified a difference. It would be very easy to argue that the English Church and the Church of England were very different, and meant two distinct Churches. Nothing was allowed by applicant but strictest law; nothing was sought from understanding, nothing from implied agreement. The question was not whether certain persons were members of the Church, but what was their status. There were several members of the University of Cambridge in the colony, and they might carry out the discipline of the University, but that would not make it the University itself. In these cases associations were not the same, and therefore of different titles. Applicant had assumed a title not in harmony with the title deeds, and not given in the letters patent; he was called the Bishop of Natal, and the name of the Church of South Africa was forced upon other persons *nolens volens*, and then that being so they are told they don't belong to the Church. Great prejudice had been raised against them because they were said to desire to separate from the Church of England and bear a new name, and one of these persons was the one who purchased St. Andrew's Church. The exact designation in the title deed of the Church was "English Church," and as it was clear that two different titles would distinguish two different firms, how could the Court decide that the applicant, holding a different title, had a clear right to action. He would now proceed to consider the question of use, and it was necessary to discuss it to show the very narrow limits in which applicant was shut up. In the case of Long *vs.* the Bishop of Capetown it was shewn that a Bishop could not interfere in general Church property. (See Burns, on leases.) It was left to the English Church to use the buildings in question in this case, and it must be shewn that applicant had a right to interfere. The use of the land as a Church was voluntary and not absolutely necessary under the title deed, which would admit of its being used for scholastic purposes. They would now pass on to consider whether by any act of the society applicant had obtained any such right, and it could only be urged that the English Church had erected certain buildings as Churches. The title deed did not set apart the property, but the society itself had done so by an act of consecration, which act was of the same character as the deposition of applicant by the Bishop of Capetown, and like that null and void in law, not contrary to law but without effect in law. The Privy Council laid down that no spiritual act should be in force in the colonies. It might bind the conscience, but not coercively before the law. To exercise spiritual authority there must be a legal sanction, and there was a perfect harmony of these in the case of Long *vs.* the Bishop of Capetown. The judicial committee refused to concern themselves about the Bishop's authority in spiritual matters, but it might, under certain circumstances, become cognisable by law, and then the law would adjudicate upon the contracts. And in this case they had to consider whether there was a contract which the law would examine, and he would quote the words of Lord Kingsdowne as to what extent the English Church subjected itself to the authority of the Bishop. It was for the Court to enforce any civil consequences following a spiritual sentence. (See Burns' Ecclesiastical Law, pages 232 and 235.) The King's Bench decided that Archbishops could depose Bishops, and that temporal consequences followed in the loss of revenue, and of a seat in the House of Lords, and in all the Courts through which the case went in appeal it was decided that temporal consequences must follow. It was, however, exactly opposite in a colony, instead of ruling, as in the well-known case of the Bishop of St. David's, that temporal consequences would follow spiritual deprivation it was decided otherwise, viz., that no temporal consequences would follow, and the oaths taken by applicant were set aside lest they should be supposed in any way to emanate from the law. With regard to the act of consecration there was no act that could be applied in this Court as a contract. Certain individuals prayed for a spiritual act, and undertake to perform some spiritual things, but applicant's counsel had not specified them, but however binding these might be in some individuals they would not be in others. There was no special act that made applicant exclusively to represent the English Church. They had first to consider whether it was not, not only bad in law

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although the members had formed themselves into an association, drawn out the rules, &c., and had connected their property with the trust deed, but whether acts of the local legislature were not needed. The association here could not have a retrospective effect. They accepted the spiritual act of consecration as binding in conscience, and that like the deposition of applicant they respected.

Mr. Justice PHILLIPS said that the impression created by these arguments was that there was no English Church in Natal, and if so the Reverend respondent did not belong to it.

Rev. Mr. Wills said he had argued that the United Church of England and Ireland did not exist as was stated in the affidavit.

The CHIEF JUSTICE observed that the Reverend respondent had said that they were not bound by the rules of the English Church.

Mr. Justice PHILLIPS answered that the Rev. respondent said that the laws of the Church of England did not bind him so far as the bench was concerned.

Rev. Mr. Wills continued to address the Court. Spiritual authority might be incidental therefore the deposition might be spiritual authority, and yet the law might not consider it. Excommunication was spiritual, but carried no legal consequences. It was, however, no infringement of the law, although anyone attaching temporal consequences to it would be restrained. But to return to the setting apart of the buildings. It must be shewn to the Court when the setting apart took place, and by what authority, and how it could be terminated or abrogated. He should now proceed to notice applicant's third position, that being legal Bishop, and certain buildings having been set apart, he (Mr. W.) by law required applicant's license. He had argued that the letters patent were no part of the law, that if they were constituted part of the law they were insufficient, as several acts of Parliament shewed, and would therefore give no legal status; this position could not therefore be sustained, and although the buildings might have been set apart by a spiritual act, still spiritual acts were not cognisable by law. Applicant stated in his affidavit that every clergyman required a license, but it was not evident why such was the case, whether the English Canon Law was enforced, and if so whether it was by contract. The laws were described by Blackstone, Vol. I., page 82 The law could not be maintained until the Court knew what it was, and Blackstone said it was provincial. The Crown could not say that they would make ecclesiastical law a part of the law of the land. It was certainly not a part of the Roman Dutch Law, nor even of the Colonial Ordinances. The Master of the Rolls claimed no authority that they should be the law in an action except by contract. He should now proceed to consider whether any contract existed, whether the buildings were set apart, and whether if any contract was proved, it included applicant and himself. In arguing this point he wished to draw the attention of the Court to section 28 of Lord Westbury's judgment. If the parties intended to enter into any such agreement it was not competent for them either to give or accept this jurisdiction. It had no legal operation in itself. It was ordinarily competent for two persons to enter into an agreement in various bodies, but Lord Westbury called the contractors in this case creatures of the law, and depending on it for their rights, &c. They must test applicant's position on this foundation, that creatures of the law can only act according to law. Under these circumstances Lord Westbury argues that applicant could not contract with the Bishop of Capetown or with anyone else. A creature of the law could not contract either with his subordinate or superior; the law only must govern his proceedings. This would seem to argue that it was incompetent for the Bishop of Capetown to administer the canon law, and yet applicant could administer it. As an officer of the law he could also only submit to the law. It was a singular position in which applicant was placed; he had rescued himself as far as the law was concerned, and was left sands dry. How could the position be sustained when his duty was not to submit himself; and yet he now endeavoured to enforce obedience? He (Mr. W.) acknowledged that it was difficult to understand the judgment of the Privy Council; there were passages in it which seemed to enable applicant to contract. Lord Kingsdowne said that they adopted the language of Mr. Justice Watermeyer and looked at them as having contracted that the laws and discipline of the Church of England should govern them as far as applicable. His Lordship had, however, limited its applicability between narrow points. With the Bishop's authority in spiritual affairs they had not to deal. They considered that the way in which the appeal was brought affected temporal rights. It appeared to him (Mr. W.) that Lord Kingsdowne satisfactorily passed the spiritual character and reduced it to one of trust. In that case there was a trust deed; the bishop was looked upon as the trustee. The contract was as *qua* bishop and *qua* clergyman, and though referred to was not adjudicated upon. His Lordship also would have undoubtedly been more reserved if he had not followed Lord Westbury. He (Mr. W.) argued that the English canon law was not a part of the law of the land, that it was not a law with respect to a particular class of Her Majesty's subjects. No such class existed, and no act could be proved that legislated for such a class. The applicant was debarred from contracting notwithstanding there was the judgment of Lord Westbury, and the Court might hold that he could contract. Then, if applicant could contract, how and when? Surely not by his oath at consecration, for it had been ruled that it was not obligatory in law, not even when he assumed the office of Bishop here in 1854 or 1855, for on that occasion he had set aside the law and himself legislated for that Church, having enjoined certain deviations from the Church of England service. The prayer for the Church militant had been ordered to be omitted, and if he had administered the laws of the Church of England these deviations could not have been authorised.

The CHIEF JUSTICE asked if the order had been obeyed.

Rev. Mr. Wills did not know.

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Mr Justice PHILLIPS said that they would not pray for rain when the country was flooded.

Rev. Mr. Wills stated that by applicant ordering these omissions he was not carrying out the Canon Law. In 1858 also the applicant did not contract to carry out the English Canon Law when he formed the Church Council, which carried out certain rules of its own, and only adopted a portion of the Church Law. Such Church Council had never, however, in any way connected itself with the property of the English Church.

The CHIEF JUSTICE said that was something like the Bishop of Capetown's Synod.

Rev. Mr. Wills therefore argued that he could trace out no act or attempt to introduce the English Canon Law into the colony until the late affidavit. If such an attempt had been made, and it were competent to do so, still the position now contended for was not one which Lords Kingsdowne or Westbury would take cognizance of. If the law was, however, as stated by applicant, it had not been his custom to act upon it. He now quoted from the law of applicant as written to the Administrator of the Government on Nov. 5, 1866. There was also another case in the colony which he would refer to, viz, that of the Rev. Mr. Barker, who, although ordained by the Bishop of Natal, had never received his license. The Dean of Maritzburg had been here much longer than applicant, and, if all the objections raised by him in this case were overcome, still the law was not such as stated by applicant. The question was not whether the license of an English bishop were required by an English clergyman in the diocese, but whether he could prove the diocese, and that he (Mr. W.) could be summarily inhibited or told to apply for applicant's license. On no grounds, and for no reason, could the rule be applied by rights. If the judges, however, concurred in saying that any such identity existed, and therefore the argument fell through, he would, for the sake of argument, suppose that it did exist, and would quote from the 36, 48, and 51 Canons of 1603. From these it was manifest that others besides the bishop of a diocese could license to preach. Applicant's general assertion could not be sustained, and before the inhibition could be granted, he must shew that the license he (Mr. W.) held was one which no one but himself could grant. (See 13 and 14, Charles II, chap. 4, section 19.) Applicant could not sustain his position in law in asserting that a license was necessary. He (Mr. W.) would not at present argue as to the applicability of an interdict being applied to the case, although that measure was more generally limited to material acts, and not to the filling of offices. He concluded by expressing a trust that he had satisfied the Court that the action of the Church in this case was not at variance with the law of the land.

The Rev. Mr. Wills, in answer to the Chief Justice, said that he had been ordained by the Bishop of the Orange Free State, and held a licence from the Bishop of Capetown.

The CHIEF JUSTICE observed that he considered it important that the rev. respondent should shew how he was acting by affidavit

The argument was then adjourned till Tuesday morning, at 10 a m. The Rev. Mr. Wills' address occupied 3½ hours in its delivery, and when it was finished the large assemblage of apparently interested parties standing in the body of the hall quietly dispersed.

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## TUESDAY, JULY 2, 1867.

The argument in this case was again resumed this morning shortly after 10 o'clock, the Court being very crowded to hear the argument which would be submitted by the counsel for the applicant in answer to that of the rev. respondent delivered yesterday.

The Rev. Mr. Wills put in the following affidavit:—

*In the Supreme Court of the Colony of Natal.*

To the honorable the Chief Justice and the judges of the Supreme Court of the colony of Natal.

Joseph Harris Wills maketh oath and saith, that he is a British subject, baptized, confirmed, and admitted to Holy Communion in the Church of England.

Deponent further saith that he is a deacon of the said Church, having been admitted into holy orders by the Right Rev. Father in God Edward, Lord Bishop of the Orange Free State, a Bishop of the United Church of England and Ireland, duly and canonically consecrated, being further valid in law, having been performed under mandate from the Crown according to the provisions of 5 Victoria, chap. 6.

Deponent further saith that he has been duly and competently authorised and licensed to exercise his office of deacon in the colony of Natal.

Deponent further saith, that he fully believes all the statement of facts made in his argument before the Supreme Court on Monday, 1st July, 1867, to be true to the best of his knowledge and belief.

(Signed) JOSEPH HARRIS WILLS.

Sworn at Pietermaritzburg, this 2nd day of July, 1867.
Before me,

(Signed) EDWD. TOMLINSON, J.P.

The CHIEF JUSTICE asked whose licence Mr. Wills held.

Rev. Mr. Wills replied that he was licensed by the Bishop of Capetown.

Mr. Justice PHILLIPS: Was the license from the Metropolitan direct or from the Vicar General?

Rev. Mr. Wills: From the Vicar General.

The CHIEF JUSTICE: Who is the Vicar General?

Rev. Mr. Wills: The very rev. the Dean of Maritzburg.

Mr. Justice PHILLIPS said the only argument submitted by respondent was that a license was not requisite here, where the laws of the Church did not form a portion of the laws of the State.

Mr. Justice CONNOR observed that one part of the argument, as he understood it, was that the petition of applicant said he was the only Bishop and the only person entitled to give a license, whereas the Canons shewed that an Archbishop could give a license as well as a Bishop.

Mr. BUCHANAN enquired if the petitioners were to be allowed to intervene.

Mr. Justice CONNOR said the only difficulty was that a spiritual interest was not enough for the Court to authorise an intervention, but the question was should they not be heard, as they had asked to be heard, on their right to intervene. The Rev. Mr Wills had argued a point his Lordship had not heard raised before, viz., that the Act 13 of Charles II. prevented the Crown constituting them a court for ecclesiastical cases, and laid down that a mere spiritual question was exclusively ecclesiastical. If, therefore, there was no question of property involved they had no authority to hear them. The statute declared that the Crown should create no new tribunals for ecclesiastical cases, and this would apply to the case of the parties trying to intervene here, admitting, as they did, that they only had a spiritual right. One part of the argument of the rev. respondent was that the Court had no right to interfere. He was not disposed to hear them as no notice had been served on either side.

Mr. Justice PHILLIPS did not read the Act of Charles in the way Mr. Justice Connor did. This Court was appointed by the Crown.

Mr Justice CONNOR said the law could not create a legislature with greater powers than the Crown.

Mr. Justice PHILLIPS said that in some colonies the Crown had given a legislature, and it had never been questioned that the legislature could give to a bishop such a jurisdiction as at home, and also could give power to the civil courts to deal with the question.

Mr. Justice CONNOR said the question was whether the Crown could do anything against an Act of Parliament. If an intervention was allowed he did not see why every member was not entitled to be heard. The principle of this case would apply to all others. If he had a building in his garden set apart for the service of the Church of England, if the principles urged in this case were law he could not have a clergyman to officiate there unless he had the permission of the Bishop of the diocese. Were they to permit every layman to be heard under those circumstances? Notice had not been given, and he did not think they should be heard.

Mr. PINSENT now rose to address the Court, and said that he had the honor to reply in support of the application for an interdict to prevent the respondent, the Rev. J. H. Wills, reading prayers or officiating as a Church of England minister in this diocese until he should have received the license of the Bishop so to do, or for such other order as to the Court might seem fit. He felt a difficulty in this case in dealing with the able and remarkable address that was read yesterday, and which involved so many points which to anyone but those accustomed to read ecclesiastical law was dovetailed in such a way as to render it difficult to follow. He must confess that if the address had been applicable he would have had some difficulty in following it, because, from the rapidity of the delivery, he had been unable to take sufficient notes; but he thought he would be able to shew the Court that the case did not depend upon the questions raised by the rev. respondent, but that there were remarkable and particular objections to the whole line of argument, and also that the case must be settled by the three last decisions of the Privy Council and the Master of the Rolls. The main points were: Was Dr. Colenso Bishop of Natal? Were the buildings referred to in the petition—the Cathedral Church and St. Andrew's Church, in use by members of the Church of England, of which he was Bishop? What were the powers which, under the common law of the Church of England, a bishop had over his clergy? With respect to license, what power a clergyman had to exercise his functions in any

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diocese without the license of a bishop? And how far the law was applicable here? It would be found that these questions were answered by Lord Romilly's decision, and the question seemed now to be, was that decision inconsistent with the decision of Lord Westbury? and as the Rolls Court was not a Court in which their lordship's decision would be reviewed whether their lordships were bound by that Court or any other Court of England—

The CHIEF JUSTICE: I do not think we are bound by Lord Romilly's judgment.

Mr. Justice PHILLIPS: But we should adopt it if it agrees with our reasoning.

The CHIEF JUSTICE: We have every respect for the judgment but are not bound by it.

Mr. PINSENT: Your lordships are bound in the same moral way as the Court of Queen's Bench is bound by a judgment of the Court of Common Pleas or Exchequer In every respect your lordship's is an inferior Court.

Mr. Justice CONNOR: Our decisions are only appealed to the Privy Council.

Mr. PINSENT said they could not forget that the last decision of the Master of the Rolls was open to a review to the parties most interested. If the broad principles of doubt thrown out by the respondent yesterday were adopted, that all the acts of attorney generals and the legal advisers of Her Majesty had been wrong, that bishoprics should not have been established without an act of Parliament, that it could have escaped the notice of able men every time a bishop was appointed, and it was left for a clergyman from the Free State to set all these questions at rest in which the Court would have to give a decision, then he would venture to say there was a very wide field of enquiry opened, and he did not know where it would lead to. He was here to-day to argue that the decision of Lord Romilly was not contrary to, but perfectly consistent with, the declaration of Lord Westbury, and that in so far as Lord Westbury differed from Lord Romilly, Lord Westbury differed from the decision in Long's case.

Mr. Justice PHILLIPS said the impression in his mind was that the Privy Council, in the case of Long *vs.* Bishop of Capetown, and in the matter of the Bishop of Natal had decided certain things, and he was not clear what they meant. There was a certain interpretation put upon them, and he wanted to see how far he could concur and how far he could not, in that interpretation.

Mr. PINSENT continued, and urged that Lord Romilly not only laid down the law but said that it was consistent with the judgment of the Privy Council, and Lord Westbury stated his judgment was consistent with that in the case of Long *vs.* the Bishop of Capetown. If there was any possibility of putting the same construction on the two cases, their Lordships were bound to suppose that it was meant in that case. He considered Lord Romilly's judgment the natural *sequitur* of all the principles previously enunciated He considered Lord Romilly's a much more carefully prepared decision than Lord Westbury's. To interpret them by the ordinary rules, therefore, that where they had certain documents, they should endeavour to reconcile them rather than raise difficulties, he felt no difficulty in saying that Lord Romilly's declaration was just an enunciation of the principles of that case. Then, again, as Lord Romilly's was most recent, and those principally interested had not thought it prudent to carry it in review to the Chancellor of the Exchequer or House of Lords, it was strong presumption that by the best legal minds of England it was considered consistent. It was true that Lord Carnarvon had not expressed that feeling, but it was Lord Romilly's feeling that Lord Westbury's decision had been misinterpreted, which led him so faithfully and fully to labor the question raised. It was necessary to consider what part of the judgment was necessary as premises for the conclusion. There were other portions very important to illustrate the case and solve the questions involved, but which were not necessary to the case in point. Their Lordships would have to consider whether the statements, decisions, and extracts were necessary for the conclusion come to. With that view he had gone through to see if Lord Westbury's decision was given in the sense put upon it by Lord Romilly. The question for the former judgment was whether the declaration of the Bishop of Capetown had any legal coercive force, as he was not seeking to carry it out in the Supreme Court but by ecclesiastical fulminations instead of by appeal to the law, and it was decided that he had no coercive jurisdiction, and certain principles were laid down as necessary for that. If the letters patent had given the Metropolitan jurisdiction; if there had been any contract between the two bishops, then the decision of Lord Westbury must have been different. So here in the case tried before Lord Romilly the great question was whether Dr. Colenso was Bishop of Natal? because, if not, he was not the person to receive those funds, as they were given on the condition that there should be a real bishop with real powers. He (Mr. P.) wished the Court to remember that all these things were necessary, and that the decision could not have been arrived at without these points had been considered. They were not bye points and non-essential to the case which the barristers—to whom the courts were ever ready to express their acknowledgments for the care with which they brought up their cases—had not argued, and on which points, therefore, the judges would not have had the benefit of the remarks of counsel not being so weighty as others, which were more or less dwelt upon in the course of the argument. If he understood the decision in Long's case it was that the contract was between the members of a voluntary association, which would be enforced by recourse to the civil tribunals. That judgment was followed by Lord Romilly's, and he (Mr. P.) had gone through the latter, to mark the places where Lord Romilly made any reference to points where he came into collision with Lord Westbury's judgment, published in the *Gazette* of August 15, 1865. In this judgment last referred to it was enough for Lord Westbury to say that the Crown had no right to assign applicant a diocese like a diocese of the United Kingdom where the Bishop had coercive power. In that case it was sufficient

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to say that the letters patent gave no sphere of action, and conferred no coercive powers. Under those circumstances the course pursued by Bishop Gray was illegal, but it must not be understood to conflict in any way with Long's case, as the Bishop had no power to enforce his own decrees. In the case of the Bishop of St. David's the question was carried from court to court as to whether the Ecclesiastical courts could enforce their own sentences, and held throughout that they could. The appointment of a new bishop in that case shewed that it was right, and the Crown took an act consequent on the deprivation.

Mr. Justice CONNOR: The Bishop of Capetown purported to deprive your client, and the Archbishop deprived the Bishop of St. David's, and did no more. What is the difference?

Mr Justice PHILLIPS: The Crown acted on the one sentence and not on the other.

Mr. PINSENT thought it would not be contended that Ecclesiastical bishops had no coercive jurisdiction at home.

Mr. Justice CONNOR said that when a bishop withdrew his license he was not aware that the person from whom the license was withdrawn could be put in prison.

Mr. PINSENT stated that the English law restrained these powers of the Church. At any rate a Lord Bishop could depose clergymen of their benefices, and go on in certain places to depose them from the status of a clergyman, and in another case in the minds of their Lordships a bishop had been deposed.

Mr. Justice PHILLIPS observed that the old ecclesiastical courts used to burn obnoxious parties

Mr. PINSENT said that remembering the declaration in Long's case, and the powers of ecclesiastical courts in England, it was clear that the Crown had no power to assign a diocese with coercive jurisdiction and power of action.

Mr. Justice PHILLIPS observed that Mr. Pinsent referred to three kinds of jurisdiction: spiritual, ecclesiastical, and coercive, and wished to know whether he used the two first names as being synonomous terms.

Mr. PINSENT said he did not make that difference. There was common and ecclesiastical law, and there was a jurisdiction *in foro d mestico*. The spiritual jurisdiction was over the conscience.

Mr. Justice PHILLIPS: What is the difference?

Mr. PINSENT said there were regularly-constituted courts in which ecclesiastical law could be enforced by authority. Ecclesiastical law carried coercive authority. If the word jurisdiction was interpreted in most cases as coercive it was consistent with the decisions in other cases, and no jurisdiction, ecclesiastical or civil, such as could be enforced by law, was created without appeal to the civil tribunals. See judgment in Long's case.

Mr. Justice CONNOR observed that in the case of Long *vs.* the Bishop of Capetown the letters patent were said to give no jurisdiction, but did not prevent the contract. The question was what was the contract, and it would have been decided in the same way had there been no letters patent.

Mr. PINSENT said his Lordship forgot that a spiritual jurisdiction was given where the contract or rules of association established a certain tribunal whose decision was adopted as final.

Mr Justice CONNOR said he took in the *Law Journal Reports*, and in the case of the Rev. Mr. Burgers Lord Westbury gave judgment, and laid down what a voluntary association was.

Mr. PINSENT said that in a voluntary association they might have no such rules. They would see how it was done in Lord Romilly's case.

The CHIEF JUSTICE said that if a number of gentlemen agreed to form a club, and made rules providing what the different rights of membership should be, and how they would be enforced if any dispute arose, then it would be argued that if the question was decided according to the rules it would be binding.

Mr. PINSENT said that would be the case even to the expulsion of the party from the club. His Lordship, Mr. Justice Connor, seemed to lay great stress on the expression that no jurisdiction ecclesiastical or civil had been created, but in the same page of the judgment it shewed how a spiritual tribunal might be established. They could not suppose that Lord Kingsdowne's was different. The fact of a tribunal implied a jurisdiction, and the question was a difficult one, but could the language used by Lord Westbury be reconciled.

Mr. Justice CONNOR said that in the case of Long *vs.* the Bishop of Capetown the letters patent were thrown overboard.

Mr. PINSENT differed from His Lordship, confessedly they were not in the appointment of a bishop.

Mr. Justice CONNOR said that the judgment went entirely upon the contract, and said that they took the contract between the Bishop and the clergyman only.

Mr. Justice PHILLIPS did not see that the decisions shewed the letters patent to be wrong in consecration.

Mr. PINSENT continued to refer to the case of Long *vs.* the Bishop of Capetown. The Court had said that it was not necessary that the Rev. Mr Long should give notice of a synod of bishops. It was sometimes forgotten that for the first 300 years there was no establishment and it was well to consider what powers were exercised in those years under conscience only. He contended that Lord Westbury, as a judge of the superior court, had said nothing in contradiction to that. His case was not founded on the letters patent if plaintiff was bishop of Natal. None unless appointed by the Queen could be a bishop of the Church of England and Ireland. The Queen's supremacy extended to all dominions of Her Majesty, and if bishops were appointed otherwise than by the Queen they were not bishops of the Church of England. He wanted the letters patent to make applicant a bishop. Irrespective of the buildings he must shew that applicant was a bishop of the Church of England and Ireland, and he shewed it by the letters patent.

Mr. Justice PHILLIPS: You argue that if no powers are given him by the letters patent still, he possesses all the powers as a bishop.

Mr. PINSENT said that was exactly the case. Lord Romilly said there were three kinds of

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powers, first *ordo*, second *jurisdictio*, and third *administratio*. The first and second a bishop possessed by consecration. Bishops possessed that when there was no established Church, when the governments of the world were pagan and all opposed to Christianity. They were in those days accorded by a voluntary submission of the people to their power. He should shew their Lordships that Lord Romilly said the origin of coercive jurisdiction began with the establishment of the Church in consequence of which it naturally followed that when the new colonies were established, and the Church of England was not established as the church of the colony, they must go back to the original status of the voluntary association. But they were not any the worse for that. The only question was what was the law of the Church of England with regard to the rights of clergymen preaching in any diocese? At any rate he was only following Lord Romilly in laying down that principle. See the judgment in the case of Long *v.* the Bishop of Capetown. It was a novelty for the Church of England to be placed on the basis of a voluntary association. There were a number of cases in which Independents, Wesleyans, and Presbyterians had gone to the courts, proved their regulations and government, and the Court had enforced them. They did not desire to silence their friend there (Rev. Mr. Wills), but wanted to know why, if he did not like their company, he did not start in fresh company. Whatever might be the case in a dissenting place of worship, he thought that in a church of this sort order must be first looked to. There must be a head to an episcopal church. He would now refer to the reasoning of Lord Westbury on the second question. The question was, whether the Metropolitan was validly appointed? There was the appointment of the Bishop of Capetown as Metropolitan, and the see of Natal, to be subject in the same way as a see in the province of Canterbury. The appointment was also with coercive jurisdiction. Then, having discussed the question as to whether the Metropolitan was validly appointed with coercive powers, the term jurisdiction is explained. In this judgment the phrase "jurisdiction, civil or ecclesiastical," meant "or coercive legal authority." These spiritual tribunals were in no sense courts established by the authority of the Crown, but in the same way that arbitrators were judges chosen voluntarily for the time. Their lordships would suppose that an able man like Lord Westbury would not talk inconsistently in his judgment, and here the reply was given coercive legal authority meant jurisdiction. In words, then the letters patent conferred coercive authority. An act of Parliament was passed to enable jurisdiction to be given to the Bishop of Calcutta and Madras, which were then only under the jurisdiction of the East India Company. (See Lord Westbury's judgment.) In the case of Long *vs.* the Bishop of Capetown it was acknowledged that these several tribunals, if disregarded, could appeal to the common law to enforce their decisions, and therefore he could not make any distinction. Lord Westbury stated that they adhered to the language of Mr. Justice Watermeyer. Not only was there especially a jurisdiction ecclesiastical and spiritual, but that by a voluntary association a tribunal might be established for rendering its jurisdiction final, if according to the rules it then went on to show that if they were disregarded the courts of common law would come in and assist on the grounds of a contract. He had a list of references to that point here, and which were most important. It might be considered that they derived no jurisdiction whatever from the letters patent, but still they were accepted as proof of consecration. He did not say that the letters patent did not confer something besides, but it was sufficient for his purpose if the title of Bishop was proved. It was quite sufficient that Lord Romilly in an analagous case held that they were sufficient to prove that there was a Bishop of Natal, that Dr. Colenso was that Bishop, and that there was a Church of England in Natal. He was content to rest on that without saying that the letters patent might not be of greater force than to make a Bishop. Let it be granted or assumed that they were sufficient to prove the relation of metropolitan and suffragan why could not a spiritual jurisdiction be entered into between Bishop Colenso and Bishop Gray? After the best consideration, however, he could take the decision without understanding the grounds on which it was made. See judgment of Privy Council. The letters patent only made the Bishop of Capetown titular metropolitan, and conferred no spiritual jurisdiction, and as this had been decided by the superior court their Lordships would have to bow to it. In the judgment of Lord Romilly he found the same thing. He stated that it was essential, and if these several tribunals were to decide on doctrine and discipline the result would be that the Church of England would be one thing in one colony and another in another. The Court had therefore decided that the letters patent did not give the titular metropolitan any such spiritual connection, and that it was not legally competent for the Bishop of Natal to give submission or the Bishop of Capetown to exercise any such jurisdiction. The agreement to make a court could not make a court, and the agreement in that case was to create a spiritual jurisdiction. The judgments of a spiritual court were not binding as the judgments of a civil tribunal were binding, and the Privy Council decided that the Bishop of Capetown did wrong in trying to enforce his judgment, he should have carried it to the civil tribunals. But Lord Westbury held that for reasons of public policy there should be no tie of a spiritual nature or legal character between the Bishop of Natal and the Bishop of Capetown. A judgment to be enforced must be legal, and the judgment attempted to be enforced was illegal and null and void in law as no jurisdiction was possessed by the Bishop of Capetown either by the letters patent or by consent. Lord Romilly said that apart from the letters patent the consecration gave certain powers—powers over the clergy under the head of *ordo*, and also jurisdiction in some way.

The CHIEF JUSTICE asked whether, assuming the consecration did vest certain powers and authorities in a bishop, without enquiring what they

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were, would those powers go with him wherever he went?

Mr. PINSENT, in answer to this question, quoted from Lord Romilly's judgment.

The CHIEF JUSTICE said that according to that there might be a dozen bishops here.

Mr. PINSENT replied that the common law of the church was such that they could only exist in exceptional cases, the exercise of the powers was confined to the diocese in which their duties were required. See Bingham's Antiquities of the English Church, vol. 1, page 51.

Mr. Justice CONNOR asked if one bishop went into another's diocese and confirmed there, could the other bishop apply to the civil law for an interdict.

Mr. Justice PHILLIPS said the fact of a bishop doing so might not have been considered so great an indecency some time ago as now.

Mr. PINSENT observed that they possessed rules and regulations, and according to them no clergyman could exercise his functions without a license from the bishop of the diocese. All these rules and regulations which were not connected with the Church of England merely as an establishment were brought here. One of the greatest evils to be guarded against was the possibility that there could be a separate system of jurisdiction, doctrine, or discipline in the Church of England in any one place different from another.

The CHIEF JUSTICE: According to Bingham when there is war there is only one diocese.

Mr. PINSENT had never heard such an unsettling of general principles as that contained in the argument of yesterday, there was hardly a principle that was not called in question.

Mr. Justice PHILLIPS: He combated very fairly altogether.

Mr. PINSENT said all he could say was that they had what the early Church had not, a standing court for deciding questions of heresy, and there was a means of bringing the matter before the proper court. He could not compliment the other party in letting the question lie. The whole objections were raised to the doctrines of the Bishop of Natal. He thought the straight forward course would be to bring the question before the Courts in the legal way. Lord Romilly had laid down the way in which it could be done, and if there was any chance of success why had they not done it. He must describe the course as one of petty persecution, because they could not, or dare not, take the manly course of bringing him before the proper Court.

Mr. Justice PHILLIPS observed that the respondent had carefully kept away from that question and did not diverge in the least. If he were Mr. Pinsent he should also refrain from referring to it.

Mr. PINSENT did not want to rip up old sores, but the members of the Church had reason to complain that this question should have stood over so long leading to such results when there was a tribunal to try the case, and these gentlemen did not venture to take the necessary steps. It was either because after the decision in the case of the Essays and Reviews they would feel that the Church of England had thrown open wide its doors, and that these doctrines, whether contrary to the opinion of some persons and considered inconsistent, were yet not inconsistent with the doctrines of the Church of England. There might be a thousand others, but if they had any complaint they should take it in a straightforward way to the proper tribunal, and not subject the applicant to this sort of petty persecution. The Court would then decide whether, as such, he should receive the immunities and pay of the Church of England. As he had quoted from Bingham's Antiquities of the Christian Church, it was their place to bring the Bishop to trial if they had any complaint against him, and if not, they should submit themselves to his lawful authority. The great satisfaction he felt in standing there that day was that the decision of their Lordships would assist to preserve that order, without which episcopacy was a farce, and he trusted their Lordships would give such a decision as would enable the Bishop, so long as he was Bishop, to maintain that order. They might prove that the letters patent were not valid, but from every principle of decency let them submit quietly while he remained a Bishop of the Church of England.

Mr. Justice CONNOR: Of course there are a good many answers to that.

Mr. PINSENT could not conceive why they did not come to their point. Mr. P. quoted Lord Romilly's judgment. The Bishop had inhibited a new clergyman because, without coming to him with the usual courtesy required by the law of the Church of England, he began to preach without his sanction. Lord Romilly said that no one but the Queen could appoint a Bishop of the Church of England, and that the Church of England, where the same doctrines, forms, and discipline were held, was the same, whether in England or the colonies. The only difference was that in one it was an establishment under certain specified laws, but here it was a voluntary association. The Queen's supremacy went into all Her Majesty's dominions all over the world. He held that the argument was the baseless fabric of a vision which said that the Queen had no power to constitute any see or diocese. He should now shew that any person calling himself a member of the Church of England, by the law of the Church of England, held himself bound by the rules of the Church of England. Because the first case went on the contract, there was no reason for arguing in this case that there was no contract. The Court had decided that there was a contract between a bishop and priest. The Bishop of Natal went through the form of the oath of canonical obedience to the Bishop of Capetown, but it was said to be illegal. Lord Westbury did not say there was no contract, but for reasons of state policy, or connected with church policy, it was declared illegal. If the judgment of the Bishop of Capetown, in the matter of the Bishop of Natal, had been legal, the judgment in appeal would have said it was valid in law, but could not be enforced in that way, as he must go to the civil courts to carry it out. As it was, however, the Privy Council judgment said that the judgment of the Bishop of Capetown was wrong in endeavouring to carry out a contract—wrong *ab initio*. The policy of the Church of England was such that in these colonial districts

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there should be no Metropolitan. It had been already decided that the jurisdiction conferred in the Bishop of Capetown's letters patent was invalid, whilst those of the Bishop of Natal were valid. It had been also decided that at present the Archdeacon had no jurisdiction in the colonies, and without reasoning in these last-mentioned matters, he apprehended the fact was quite sufficient At any rate, although the Court were not bound by Lord Romilly's judgment, they were by that of Lord Westbury, which ruled in the matter of the Bishop of Natal that the judgment of the Bishop of Capetown was illegal, being founded on a contract bad *ab initio*. It was well known that the Church existed in its present form for more than 300 years. It was also well known that the Church of England was not like an Independent church, where each church might adopt what forms, discipline, and doctrine they liked.

Mr. Justice PHILLIPS asked whether, on a person entering a deaconry, did he not then enter into a contract to acknowledge the Queen's supremacy as head of the church?

Mr. PINSENT said that he would swear to it, and was bound to read the liturgy and confess his assent and consent to everything. By the fact of entering a corporation as a member he was bound by the status, laws, discipline, &c., of that corporation, and could not go from it. They were dissenters if they did not acknowledge the Queen's supremacy

Mr. Justice CONNOR could not understand how the Queen was supreme over a voluntary association.

Mr. PINSENT considered that Lord Romilly's judgment would have great weight in any of the English courts, and that it would not be said that the Roll's Court was not their appeal court. The reasoning of Lord Romilly must be admitted as reasoning, and they would not say they were not bound by his decision. He had referred to the utter confusion which the consequences of requiring an express agreement with the resident clergy who had served under applicant acknowledging him as a bishop would cause, and surely a foreigner would not be allowed to interfere—of whom very little was known, and whether he produced his letters of orders from his bishop or not. If such express agreement was held to be necessary a stranger could not be touched. A state of things more utterly barbarous and more inconsistent with order he could not conceive. The courts of law would enforce the rules as those of a voluntary association and not ask whether there was an express agreement in every case because it was most unnecessary. It would be simply necessary to prove that he was governed by certain rules, &c., by reason of his attendance, and by his applying for admission, and by the forms and ceremonies which constituted membership. Just so he should argue that a person having undertaken to preach in an episcopal church had admitted that he was a member and clergyman of that church. The Bishop had all the powers of a bishop of the early church, and was a bishop, whether he had a territorial diocese or not.

The CHIEF JUSTICE observed that Mr. Pinsent seemed to argue that applicant was a bishop by virtue of consecration; and asked what was the distinction between a territorial and any other bishop?

Mr. PINSENT apprehended that if Bishop Twells were to baptize, consecrate, confirm, &c., in this diocese his acts, as acts, would be perfectly legal. He could do all those acts which Lord Romilly classed under the head of *ordo*. Why should the proof of a voluntary contract in the Episcopal Church in the colonies be more difficult to prove than the same proof as regarded dissenters? The canon law could not now be administered in ecclesiastical courts, but all cases must go through the civil courts. If it was asked why Bishop Twells could not officiate, &c., in this colony, he should answer that it was a territorial diocese, but apart from that he would have a right to exercise his right of *ordo* here by consent. In the petition before the Court it was stated that no clergyman could officiate without the license of the Bishop, and also that Dr. Colenso was the legal Bishop of the diocese, appointed by letters patent. In what way was the contract to be proved? A man who assumed the position of a Church of England minister was bound *ipso facto* by the very fact of accepting the position of a clergyman; he was bound by the laws of the Church, and contracted with the laity in every way to adhere to its laws and formularies. It was not necessary that a party should be a party to a deed to come within the scope of the deed. The question was what became of episcopacy. It might be a voluntary association, and it had been for 300 years The Independent Churches had no connection with each other, but the Wesleyans were the same all the world over. In America the Wesleyans were episcopalian, and Wesley had consecrated a bishop. The succession in the Episcopal Church was maintained, if he mistook not, by special Act of Parliament, passed after the separation of the States to enable the Archbishop of Canterbury to consecrate a Bishop for the Church in America.

Mr. Justice PHILLIPS: The rev. respondent abolished the idea of an apostolical succession.

Mr. PINSENT: He did not intend it, my Lord. In former times the church swallowed the state, but now the state swallows the church.

The CHIEF JUSTICE: Apostolical succession is the passing of new Acts of Parliament to make new bishops.

Mr. PINSENT continued to observe that very few persons would be found who would give up their Queen's supremacy, because, if so, they would not consider themselves identical with the Church of England. Their desire was that they should not be separated from the Church of England merely on account of its being a voluntary association in this colony instead of an ecclesiastical Church, as at home. Out here they had all the rules and discipline, &c., but instead of having ecclesiastical courts they appealed to the civil courts. If they varied, they would not be the Church of England, though they might be the Church of South Africa, in communion with the Church of England. See Lord Romilly's judgment. The regulations of the Church would be proved, being recognised and well known as the rules of

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the Church of England. The episcopalian body was a series of atoms, a heap of sand, and he did not believe that any persons would hold together without rule and the infliction of certain penalties, whether spiritual or social. There must be power to enforce the rules of common civilised society. As a rule, if a person did not obey those forms, although many were without reason, whether in London or elsewhere, there was a social law and tribunal, to which they would be held responsible. The effect of following out the arguments contended for would be to put the Church of Eng land in a worse position than any other body on the face of the earth The public, or any layman, had as much right as the rev respondent to get up into the pulpit to preach. If he had shewn that the Bishop's license was necessary, he trusted the Court would grant the order prayed for. The fact of applicant being connected as trustee with the building mentioned before the Court shewed that he was connected with the Church of England, of which, also, he was the Bishop. These buildings were not to be used by another sect, forming the Church of South Africa. Everyone professing themselves to be members of the English Church, became subject to the rules and regulations of that Church. He considered the first part of his argument most important, and he should have failed in his object if he had not shewn that the decision of Lord Westbury, taken in conjunction with Long's case, contained every principle laid down by Lord Romilly, and although this latter was not in form binding on the Court like the others, their Lordships could not fail to take into consideration Lord Romilly's remarks on the subject. He had shewn that applicant was Bishop, that by virtue of that and his consecration he possessed the powers of *ordo* and *jurisdictio* by consent, that the governing of the voluntary association by the laws and rules of the Church of England, united, in a sort of tri-lateral contract, the clergy, laity, and their bishop. Assuming he was Bishop, and that the rules, ordinances, and powers of a bishop over his clergy were proved, how far was it necessary that there should be a license. Their Lordships would remember the argument of respondent was founded on the startling doctrine that all these powers, &c., were illegal. There were two licenses in times gone by when the ministry were generally an illiterate lot, and the bishops only expounded the doctrines with some of the more learned of the clergy, and the license mentioned in the 36th Canon was merely a testimonial of the fitness and ability of the possessor to preach. Their lordships must also read the 37th Canon. The rev. respondent was free to come before the Bishop, and subscribe to the 39 Articles; Crypps, page 87 and 635. He would think it absurd to argue that this Court had no ecclesiastical jurisdiction. But in settling the rules of a voluntary association they did not act as an ecclesiastical court, but to administer justice. It also seemed most absurd to say that the Crown could not constitute an ecclesiastical court. With regard to the argument that the Archbishop of Canterbury could not receive the resignation of the Bishop of Capetown, he had no doubt that the Archbishop was duly authorised by the Crown before the resignation took place. In conclusion, the opposite party might have raised the validity of, or questioned the jurisdiction conferred by the letters patent, but if they objected to the doctrine, Lord Romilly had pointed out how that could be brought before the proper court. This indirect way of proceeding only raised strife, and prolonged a contest already very much embittered. He trusted the Court would say there was power in the Bishop of Natal to keep order, and that he would be allowed to exercise it in the interest of public decency and order, that they would grant him the power that, whilst Bishop of Natal, he might maintain order and discipline among his clergy The argument brought forward by the other party seemed to him to throw everything in doubt. Unless, however, there was some recognised rule society must fall into disorder. It was an impossibility that episcopacy could go on without a bishop, and if the Court were bound by the law to decide against him most persons would regret it. On these grounds, and because it was inimical to decency, good order, and discipline, and also because feelings were engendered and animosities excited, which would not so soon die out, he appealed to the Court to grant this power to the only person entitled to receive it—the Bishop of Natal.

Mr. Pinsent's address, which had been most attentively listened to by the Court, occupied 4½ hours in its delivery.

Mr. P. Davis, sen., now applied to be allowed by the Court to intervene.

Mr Justice PHILLIPS was glad that there were reasons for not hearing any of those who were supposed to be interested. So many persons, out of a vulgar love of notoriety, were trying to mix themselves up in the matter.

Mr. Justice CONNOR observed that Mr. Davis was churchwarden of St Andrew's.

Mr. Justice PHILLIPS: And cannot he be content with that honor.

Mr. Justice CONNOR apprehended that they should decide matters according to law, and, as far as he was concerned, he was desirous that his reasons should be understood, for he was certainly one of the worst reported men, but it was always his endeavour to make himself understood by those who heard him. The question was whether the individuals who had filed the petitions, being now before the Court, had a right to intervene, and his Lordship did not think that in a matter of spiritual interest they had any right to intervene. He believed the question was a most important one to all persons in the Church of England. The principles in this case would affect every single worshipper in the English Church in Natal. He, however, could not see that a spiritual interest gave any right of intervention, and thought an intervention could only be allowed in cases where questions of property or contract were involved.

The CHIEF JUSTICE said that he had felt inclined to listen to the petitioners, but thought that in this particular case it would be inexpedient to allow the parishioners to intervene in a question that arose between the Bishop and a gentleman occupying another position in the Church. It was not a question that affected the parishioners so directly

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as would enable them legally to ask to be heard in reference to their interests. If Mr. Davis was also heard they would be open to hear some 200 or 300 people in the same way. That fact would sufficiently shew the inexpediency of allowing it to take place.

Mr. Justice PHILLIPS did not think that any of the parties could afford any information that would assist the Court in its decision.

The COURT reserved its decision, and the Hall, which throughout the whole of the proceedings had been crowded with interested listeners, was soon almost deserted.

## THURSDAY, JULY 4, 1867.

### S. WILLIAMS *vs.* T. WARWICK BROOKS AND WILLIAM FRASER.

After disposing of two cases, a report of which will be given farther on, the Court heard the following, which excited considerable interest, the court being crowded during the whole of the proceedings.

Mr. J. B. Moodie appeared for the applicant, and Mr. Buchanan and Mr. T. Shepstone, jun., for the respondents.

Mr MOODIE said the respondents were summoned to shew cause why they should not be committed for contempt of an order made by Mr. Justice Connor, in chambers, on the 26th ult.

Mr. BUCHANAN objected to the application being proceeded with in that form. His clients ought to have had notice, in order that they might have some clue to the present proceedings.

Mr. Justice PHILLIPS enquired whether Mr. Moodie had a power of attorney from Mr. Williams.

Mr. MOODIE said he had not.

Mr Justice PHILLIPS: How do we know Mr. Williams concurs in this application. Does he, in fact, instruct you?

Mr. MOODIE: I have power in the whole matter.

Mr. Justice PHILLIPS: The question is does Mr. Williams instruct?

Mr. MOODIE: Had I anticipated such a question I should have produced the power of attorney.

Mr. SHEPSTONE: We question the power. As I am instructed Mr. Williams does not concur.

The CHIEF JUSTICE said it was not the practice of the Court to ask for powers of attorney.

Mr. BUCHANAN: This is the proper stage of the case to submit that this application cannot proceed. First we have no notice of any intention to make such an application.

Mr. MOODIE: Yesterday I served notice on the respondents of another application which is to come before the Court on the 9th inst., for contempt of a subsequent order.

Mr BUCHANAN: In the second place I maintain that Mr. Williams and Mr. Moodie have no right to serve me with notice, as they are not the parties who proceed in this matter. If there is any complaint that any wrong has been done to the Court the Court is the party to call on us to show cause.

Mr. Justice PHILLIPS: We do not move of ourselves.

Mr. BUCHANAN: It is a very happy thing for Natal that we have few precedents to guide us in such a case as this, but from all that I can gather from authorities the disobeying of an order can only be brought into Court by the solemn summons of the registrar issued against the offending party. It is not Mr. Williams or Mr. Moodie who should claim that the authority of the Court should be vindicated. This is an act, supposing it to have been committed, which according to the Roman Dutch and English authorities must be dealt with in a different manner to that which is proposed, and therefore I contend we are not before the Court. There is no inherent right, I contend, on the part of the applicant to come here and turn public prosecutor.

Mr. Justice PHILLIPS: If a party gets an order of Court, and that order is disobeyed, he comes here and expects to get it enforced.

Mr. BUCHANAN: And there is no redress?

Mr. Justice CONNOR: When there is an assumed contempt of Court has not the Court a right to see that the other party has not its ends defeated?

Mr MOODIE: Mr. Williams is in Court, and says I have his authority to make this application.

Mr. BUCHANAN: I could understand this question if we were dealing with a matter of civil right, but when it came to a matter of complaint, then this is a summary way of dealing with it not contemplated by the authorities. I could refer your lordships to Van der Linden on the subject.

The CHIEF JUSTICE: He says nothing about it.

Mr. BUCHANAN: It is to be regretted that we have so few precedents.

The CHIEF JUSTICE: You went to prison often enough, you ought to know. (Laughter.)

Mr. BUCHANAN: The Court appears against me, and I will let the application go on.

Mr. MOODIE then proceeded to support his application by reading the affidavit made by Mr. Williams on the 26th ulto.; the order of Court of the 1st May, 1866, which restored to the Rev. Mr. Green all the rights and privileges of holding service in the Cathedral which he had always held, and the order of Mr. Justice Connor made on the 26th ult., the first and last of which appear in another portion of to-day's issue.

Whilst Mr. Moodie was reading the order of Court made on the 1st of May, 1866,

The CHIEF JUSTICE asked: By the bye, has Mr Green complied with the order of Court made against him?

The Registrar: No, my lord.

Mr. MOODIE: The last order I read was made on the 26th ult. On the 29th a further order was applied for, founded upon an affidavit that, notwithstanding that order, no one was admitted into the Cathedral except the Rev. Mr. Green. I also produce the order made by Mr. Justice Connor on the 29th ult., and the Sheriff's certificate that he served a copy on the respondents.

Mr. Justice PHILLIPS: Has the other side been served with all those affidavits?

Mr. BUCHANAN: No.

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Mr. Justice PHILLIPS: Then how can they reply? Do you wish the respondents to be sent to prison?

The CHIEF JUSTICE: Mr. Green was not sent to prison.

Mr. Justice PHILLIPS: That has nothing to do with this application.

Mr. BUCHANAN: I submit it has.

Mr. MOODIE: Mr. Williams is the person who appears in this matter. I have nothing to do with anyone else.

The CHIEF JUSTICE: But the order has to do with some one else. It is true that Mr. Williams is the applicant who applied to Mr. Justice Connor, but the first order was for the benefit of Mr. Green.

Mr. Justice PHILLIPS: Even granting that, it was a relief of Mr. Green from contempt, the effect would be that he could not get a civil remedy till he had purged himself of the order against him.

Mr. MOODIE: Mr. Williams in his affidavit not only prays for himself, but prays the relief of a certain person whom he hears preach in the cathedral. He says he has a right to go there and hear service performed by that person. I suppose the word contempt has got a certain meaning attached to it, and by that person being in contempt he stands the consequences, but I do not see why that person should not preach there. Your Lordships might as well order that Mr. Green should not eat his dinner.

The CHIEF JUSTICE: Now you are talking nonsense.

Mr. BUCHANAN: As far as present advised, the opposite party has shewn deliberate contempt. Here is a gentleman who has deliberately set the Court at defiance coming here for relief. We have not been placed in contempt and yet proceedings have been taken. It is palpable that Mr. Williams has declared that he has acted contrary to his convictions until pressed to take these proceedings.

Mr. MOODIE: I deny that fact.

Mr. Justice PHILLIPS: Have the respondents any affidavit.

Mr. BUCHANAN: Yes, but I wish to avoid reading it. I submit that your Lordships should settle the point whether, as a matter of fact, the application has not been made at the instance of Mr. Green.

Mr. Justice PHILLIPS: Is it a fact that Mr. Williams applies for the order and then protests against it.

Mr. BUCHANAN read Mr. Williams' protest as affixed to the Cathedral door.

Mr. BUCHANAN: Upon the face of these proceedings the application is made on behalf of a gentleman who is in contempt of an order of this Court.

Mr. Justice CONNOR: What is the date of that order:

Mr. BUCHANAN: 1st May, 1866.

Mr. Justice CONNOR: Does it not expire at the end of a year?

The CHIEF JUSTICE: If Mr. Green had applied and that order was shewn to the judge he would not have got it.

Mr. Justice CONNOR: This is Mr. Williams' application.

Mr. BUCHANAN: That is a mere ruse and subterfuge. I am entitled to argue that. Upon the face of the documents it is a mere farce and sham to say that Mr. Williams is the applicant. The person to be relieved is Mr. Green. He alone is to be benefitted, and he is an outlaw.

Mr. Justice PHILLIPS: The step you should have taken was to set the order on one side. You could have applied to Mr. Justice Connor that the order was granted in surprise.

Mr. BUCHANAN: I did apply to Mr. Justice Connor for an order to prevent a certain act from being performed by a certain party, which would have rendered this order nugatory, but his Lordship refused it.

Mr. Justice CONNOR: You were not refused. I said that application raised a question of law, and it would be better to wait till the first day of term. To that you assented.

Mr. BUCHANAN: I never expected to get the order I applied for. I did not assent.

Mr. Justice CONNOR: As you got up to go away I said Bishop Twells was not expected till the end of the week. It is a misrepresentation to say that Bishop Twells' coming was the ground of the order.

Mr. BUCHANAN: Most certainly that was not the case.

Mr. Justice PHILLIPS: Whatever you believe you cannot contend with his Lordship.

Mr. Justice CONNOR: It was not till you were leaving the house that Bishop Twells' name was mentioned.

Mr. BUCHANAN: I submit to your Lordship, but I contend that Mr. Williams is not the person really applying, but that his name is simply used to accomplish another purpose, not disclosed in these proceedings. I put it, therefore, whether, under the circumstances, seeing that Mr. Williams is acting contrary to his conviction, that he protests against the desecration of a place of worship which took place, and seeing that he had been made use of, seeing, also, that there has never been the slightest opposition on the part of my clients to Mr. Green's preaching in that church, and that he has been freely tolerated there; in the face of these documents the application does not fall to the ground.

The CHIEF JUSTICE: I think it is a great pity that Mr. Williams does not adopt the motto that there is nothing like leather.

Mr. BUCHANAN: I should like to know whether it would be competent for me to suppress the fact of an order being in existence, and clandestinely go behind that order and get another from a judge? Mr. Justice Connor might not be aware of the order against the Dean being in existence.

Mr. Justice PHILLIPS: There was no application made by the Dean. I say the order now in question being in existence, there must be some excuse why it was not obeyed.

Mr. BUCHANAN: This order goes directly to Mr. Green's benefit.

Mr. Justice PHILLIPS: I grant that.

Mr. BUCHANAN: The order is contrary to the other. The May order of last year is set aside by

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obtaining the assistance of a man who shews he has been influenced. He is not the person in whose favor the order was made. We now stand before your Lordships as criminals, but sending my clients to prison does not give Mr. Green possession of the building. They have got their redress. Mr. Justice Connor has ordered a certain thing to be done, and all that was wanted has been obtained, I contend, unconstitutionally. We offered no opposition. We stand before you as criminals, and you are to vindicate the dignity of the Court by punishing the offenders. What have we a right to expect; why, that the charge shall be made in a substantial form; we want time to get witnesses to reply to these affidavits, time to get evidence, and the right to cross-examine the witnesses who lay the charge against us. If we are to be dealt with civilly, then our answer is that the parties have got all they want.

Mr. Justice PHILLIPS: It is a fair argument in palliation that if the contempt existed it does not exist now.

Mr. BUCHANAN: They do not ask for indemnification or costs. All they do is to vexatiously persecute. If any one was offended it was the Court.

Mr. Justice CONNOR: Who got the order against Mr. Green?

Mr. BUCHANAN: The Bishop.

Mr. Justice CONNOR: The Attorney General does not appear to have taken the matter up as the public prosecutor.

Mr. BUCHANAN: Probably the other party did not take the trouble to do that.

The CHIEF JUSTICE: Where is the Sheriff's return?

Mr. BUCHANAN: That will come before the Court when the second order is brought up.

Mr. Justice CONNOR: You are charged with a continued interruption.

Mr. BUCHANAN: There was no interruption. The place was in a state of siege; the Sheriff was ordered to break into it, and he did so. In May last year the Court gave the Dean immunities and privileges. We could have interfered, but instead of doing that we have continued to let the Dean have possession, and have never interfered with the May order until such time as the Dean wanted to do something which the Court never contemplated when the May order was granted. They did not give us notice that they were going to apply for an order. They did not tell us when Bishop Twells would arrive, and I submit that this order is not one, the resistance of which can place us in contempt. And, again, I submit that the principle on which the Court acts in matters of contempt is one which would justify me in believing that we are not acting in contempt of that order, but in defence of our rights, and in so doing went to such a length as we legally might do, and having done so, then the officer stepped in and obeyed the order of the Court. In point of fact, we were doing an act in conservation of our legal rights.

Mr. Justice CONNOR: What protection have they that the same thing may not be done to-morrow?

Mr. BUCHANAN: They have the protection of the Court. On the other hand, what protection have we?

Mr. Justice CONNOR: You have the right to come here, and I should make an order as much for you as for the other side.

Mr. BUCHANAN: I hold that the non-compliance of the order is not a contempt. My clients think there are a great many other grounds which I should urge, but I will content myself with putting in the affidavit of Mr. T. W. Brooks. I see no other way of excusing ourselves, but it is scarcely fair to put us on our trial in this snug way. It reads as follows:—

IN THE SUPREME COURT OF THE COLONY OF NATAL.

In the matter of Samuel Williams and William Cattell, Churchwardens of St. Peter's Cathedral Church, and as such representing the congregation thereof, applicants, and Thomas Warwick Brooks and William Fraser, respondents.

Thomas Warwick Brooks, of Pietermaritzburg, maketh oath and saith that he is Churchwarden of the Cathedral Church in the city called St. Peter's, and one of the above named respondents, and that as such Churchwarden he has taken the active and responsible part in the proceedings referred to in the orders requiring William Fraser and him, deponent, to appear before this honorable Court, and that said William Fraser has merely assented to allow him, deponent, to act to the best of his, deponent's judgment in regard to the steps taken in the assertion or maintenance of the rights which he, deponent, has deemed it his duty to endeavour to conserve: and that, if any error has been made or any blame is to be imputed, he deponent, is solely answerable for such error, and its consequences. And deponent further saith that he has read the affidavit of Samuel Williams, sworn to on the 29th day of June, 1867, and with reference to the statements therein contained, deponent saith, that the said Samuel Williams and William Cattell are not duly elected and appointed Churchwardens of the Church of St. Peter's, not having been presented to the Bishop of Natal, according to the law and usages of the Church of England, and have not, as deponent believes, any such rights as appertain to the office of Churchwardens. And deponent further saith that he was informed and believed that it was the intention of the Reverend James Green to introduce into the said Cathedral Church one Bishop Twells, for the purpose of conducting divine service, the said Reverend James Green having no authority or right so to introduce said Bishop Twells, without the consent of the Bishop of Natal. And deponent further saith that in order to ensure the peaceable and orderly decision of the question as to the said Bishop Twells' right to intrude into said Cathedral Church without the consent of the said Bishop of Natal, he, deponent, addressed a letter to the said Samuel Williams and William Cattell, dated 25th June, 1867. intimating his, deponent's, intention to prevent such intrusion. And deponent further saith, that considering himself and co-Churchwarden the legal custodians of the said Cathedral Church, and having it under their legal control for the purpose of preventing any intrusion there into, or misuse thereof, took steps to prevent such intrusion. And deponent further saith, that he had reason to believe that false reports were intentionally circulated with reference to the probable date of the arrival in the city of the said Bishop Twells, in order if possible to prevent him, deponent, from becoming definitely aware of the facts to depose thereto if necessary, and by that means to procure the intrusion of the said Bishop Twells into the said Cathedral, without the leave of the Bishop of Natal, in defiance of public decency, in violation of common courtesy, and in such a way as would prevent said Bishop Twells carrying out his plans and intentions by legal restraints being applied for and obtained. And deponent further saith that it never was deponent's intention to exclude the Reverend James Green from officiating as usual in said Cathedral Church, providing he would promise not to intrude the said Bishop Twells, and that the application of the said Samuel Williams and William Cattell was not straightforward or *bonâ fide* inasmuch

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as that they were, as deponent verily believes, well aware that the intention of him (deponent), in anything done by him in the proceedings referred to, was done to prevent the intrusion of the said Bishop Twells, and only for that purpose, and that application to ensure the admission of the Reverend James Green was in fact a fraud upon the Judge to whom that application was made, and so made for an entirely different purpose than that alleged or pretended by the applicants. And deponent further saith that the said Samuel Williams has published a written statement acknowledging that he acted contrary to his convictions, and has virtually joined with deponent in denying the right of the said Bishop Twells to officiate in said Cathedral, and protesting against the said Bishop Twells so officiating. And deponent further saith that he verily believes that the application of the said Samuel Williams was virtually a fraud upon this honorable Court, inasmuch as that he, the said Samuel Williams, being unduly influenced to act contrary to his honest convictions, became the instrument in the hands of others to procure indirectly, and by stratagem, a hearing before one of the Judges of this honorable Court, and an order granting larger privileges than he the said Reverend James Green was entitled to under any previous order of the honorable Court, the said Reverend James Green being, at the time of the making of said application on his behalf, declared by the full bench of Judges in this colony to be an outlaw, in consequence of the said Reverend James Green having refused to comply with an order of all the Judges of this Supreme Court, and being held by them to be in contempt. And deponent further saith that the suspicions which he, in common with those whom he represents as churchwarden, as to the real intention of the said Samuel Williams, or of those by whom he was instigated and prevailed upon to make the said application, have proved to have been well founded and have been fully realised, inasmuch as it is now notorious, from a document published, as deponent believes, at the instance of the said Bishop Twells, and Reverend James Green, that the Bishop of Capetown and Bishop Twells, both residing beyond the jurisdiction of this honorable Court, have been plotting, contriving, and conspiring to invade this diocese, to interfere with the rights of the Bishop of Natal, and to arrogate powers and functions in defiance of all the known usages, customs, and laws of the Church of England, and thereby outraging the majority of those who are members of that Church in this colony. And deponent further saith that, in addition to the letter written by him (deponent) to the said Samuel Williams and William Cattell, relative to the threatened intrusion of the said Bishop Twells into the said Cathedral without the consent of the Bishop of Natal, he (deponent) caused an application to be made to the honorable Mr. Justice Connor for an interdict restraining the said Reverend James Green from introducing, and the said Bishop Twells from intruding into said Cathedral Church, and that he (deponent) is informed, and believes, that such application was refused on the grounds of the affidavit on which it was founded being said to contain statements as to the law and on the further grounds that the judge had heard that Bishop Twells was not expected so soon, and that the matter could be brought before the full court at its next sitting, which was within a few days of the date on which said application was made. And deponent further saith that the property of the said Cathedral hath been adjudged by this honorable Court to be vested in the Bishop of Natal, and that he (deponent) has been duly elected, by the members of the Church of England assembling in said Cathedral, and confirmed in his appointment by the Bishop of Natal, as the churchwarden of St. Peter's, and that in what he has done with reference to the orders issued for alleged disobedience to which he is cited to appear before this honorable Court, he (deponent) has done in what he believed to be the *bonâ fide* exercise of his functions as churchwarden, and in the maintenance of his rights, and those of the Bishop of Natal, and of the congregation by whom he (deponent) was elected, and in conformity with what he (deponent), has understood to be the dicta and intention of this honourable Court, in respect of the permission to the said Reverend James Green to officiate in said Cathedral, and from no desire to do other than conserve such rights as he (deponent) may be reasonably supposed to be entitled to assert and maintain by all legal means, and not with any intention to commit a contempt, or what may by any possibility be construed into a contempt, of this honourable Court.

Mr. BUCHANAN: In the position in which I stand, this is not the way in which we should be tried for contempt. They have got all that they wanted, and all that they are entitled to, and if the Court is the party to vindicate the law the authorities lay down, that another course must be taken. If you think there is no strength in my argument, then there are two ways in which this alleged contempt can be construed. If we have acted with *mala fides*, then I submit that we show two grounds, one of exception and the other of extenuation. Here is a gentleman in Capetown who is plotting with certain gentlemen in the Free State and this colony; some of these parties are beyond the reach of the Court, and if you think these parties are acting in violation and defiance of the judgment of the Privy Council for the purpose of molesting, annoying, and persecuting us, you will see that we have grounds of excuse, and no substantial remedy against them. We have acted in self-defence, and if not justifiably we have much to excuse us, and whilst your lordships are aware that in all religious disputes mens' passions are often aroused, we have abstained from any violence.

The CHIEF JUSTICE: How can men settle; we cannot settle your disputes if you will not obey our orders.

Mr. Justice CONNOR: What right have you to say that your legal rights are clear when that is the very question which has yet to be settled.

Mr. BUCHANAN: We are here as a community who have certain religious privileges which we have preserved for years. Here are men far away from us who are prompting acts calculated to arouse men's bitterest passions. Are they to be allowed to do this?

Mr. Justice CONNOR: Suppose they say that they are carrying out the laws of the Privy Council instead.

Mr. BUCHANAN: Then let them establish it in their own way. They are slandering the reputation of a gentleman and Christian Bishop. They set Her Majesty's letters patent at defiance, and whilst they are asserting their assumed legal rights they are committing offences against all decency and propriety. We have as much right to have our religious feelings respected as our private property, and if any gentleman invade these rights, by telling us that our ministers are heretics, and then follow up these slanders by acts, I say we are right in acting in defence. We are not only to suffer these outrages but this gentleman in Capetown is to send his emissary to force his way, through the law, into our place of worship. I say it is not Mr. Williams, it is not Mr. Green, it is not Bishop Twells who has done all this, but somebody else who comes forward, publishes his anathemas, fulminates his proclamations, and outrages our feelings. In what we have done we have conserved our rights, and the surrender has been made in the form required by the Court.

The CHIEF JUSTICE: You did not surrender.

Mr. BUCHANAN: We did tacitly. Every man has a right to refuse an order of Court.

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The CHIEF JUSTICE: But he must take the consequences.

Mr. BUCHANAN: And the Court may consider how far a man's conscience is to be respected.

The CHIEF JUSTICE: You thought very little of that in Mr. Green's case.

Mr. BUCHANAN: There is not a man on the other side who would touch a hair of Mr. Green's head. They respect him too much, and regret that he is made such a tool of by the Bishop of Capetown.

The CHIEF JUSTICE: It is distinctly shewn that the order was disobeyed, and we have not to look whether there were sufficient grounds for granting it.

Mr. BUCHANAN: That is a very narrow way to look at it. A judge might order me to stand on my head for two hours.

The CHIEF JUSTICE: No judge would make such an order as that. If I did, I certainly should see that it was carried out. (Laughter).

Mr. BUCHANAN: It is possible that the judge making this order might have done so in mistake.

The CHIEF JUSTICE: I do not care whether he made a mistake or not.

Mr. SHEPSTONE: The simple question before the Court is whether the respondents had disobeyed the order or whether they had not, and if they had whether there were not palliating circumstances. In an order of Court the penalty of attachment must be clearly set forth. I contend that the respondents did obey the order. Mr. Green and Mr. Williams presented themselves at the door as soon as the order was served, and were admitted into the Cathedral, and therefore, so far as the letter of the law is concerned, it has been obeyed.

Mr. Justice CONNOR: The order was to restore possession and such privileges as they had before.

Mr. SHEPSTONE: But the order did not extend to the congregation, There was nothing done to prevent Mr. Green ascending the pulpit and preaching.

Mr, Justice PHILLIPS: If you asked for an egg, would you be satisfied with a scorpion?

Mr. SHEPSTONE: I have also to urge that we resorted to these acts in consequence of Mr. Justice Connor not granting an application restraining Bishop Twells from preaching in the Cathedral.

Their Lordships having consulted,

The CHIEF JUSTICE said: I think the Court would be wanting in the proper performance of its duty if it did not on this occasion see that its order was carried out. As I have already said, it appears to me immaterial whether the order was rightly or wrongly granted. It is granted on the face of it, and it is therefore to be obeyed, and the person on whom it was served cannot say it is insufficient. From what has fallen from Mr. Shepstone it appears that the time has at last arrived when the dignity of the Court must be established and supported. The case of Mr. Williams being in contempt was one brought before us, but in the case of the Dean the Court decreed that he should be in contempt, but refrained from imposing any fine or imprisonment. Had it been myself I would much rather have been fined than had such a decree recorded against me. It appears that in the case now before the Court the order was granted and the notice was served, and although there may not have been personal violence used, still by passive resistance its effect was totally defeated, and the person who was to have obtained possession of the Cathedral was kept out of it until at last the applicant was compelled to apply for another order, and even then the officer of the Court had to resort to the exceedingly unpleasant duty of resorting to force to break open the door. If the order had been complied with, the force which was used would have been totally unnecessary. I do not think it expedient to say more; our orders must be obeyed, and the fine we are going to inflict must not be taken as a criterion in any future case, because the Court has power to inflict any fine, whether it be 5s. or £5000, and therefore the amount must not be regarded as a limit. The Court can inflict a fine or imprison, or they can do both, but under the circumstances of this case they think that justice will be met by inflicting a fine of £5 on each of the respondents.

Mr. Justice PHILLIPS: I agree with the Chief Justice. There is no doubt that the order has been made, and it is sufficient to find on the face of it that it has been properly obtained, and that the respondents had committed a contempt in disobeying the same. The measure of punishment for the disobeyance depends greatly on the circumstances of the case. It has been urged in palliation that the respondents had not gone far in disobedience, and that the parties were actuated by what they considered a strong sense of duty. I am willing to admit this, and concur in the infliction of the small fine imposed by the Chief Justice. It must, however, be borne in mind that on future occasions of a like nature, as mentioned by the Chief Justice, heavier penalties will be inflicted, penalties which would not only cause a ready obedience to the orders of the Court, but would also deter parties from the gross outrages which were becoming a reproach to the colony. It has been well shewn by one of the parties in this matter that a great religious feeling has existed on the subject, and that feeling was increased by the knowledge that the representative of one of the parties was going to be grossly insulted by the bringing into his Cathedral Church another bishop, and causing him to perform certain rites and services which the other parties considered their own bishop qualified to do. The Court is bound to consider these circumstances, and therefore I think the fine inflicted is sufficient to meet the circumstances of the case. But I go further than the Chief Justice, and say that something must be done, not alone to enforce the order of Court, but to stop, in some measure, these exhibitions that take place on both sides. I wonder myself there are not men of sense of either party whose influence would be quite sufficient to restrain the acts of some of their followers. Surely, amongst both parties, there were gentlemen who could have secured the house of God, the temple in which they worship, from desecration, and from the invasion of strangers and hirelings, and that they could have prevented men from holding orgies and committing brawls in the sacred building. I believe

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that the persons before us are not the chief persons to blame in this matter. I am sorry to say that I blame a Christian Bishop, who, if he did not proclaim, allowed his partizans to proclaim, that he would invade the diocese, and usurp the functions proper to the Bishop of Natal alone in his Cathedral Church. If this invading Bishop does not follow the precepts of peace and charity which were inculcated by his master, he ought at all events to shew that delicacy of feeling which is observed between one gentleman and another, and to have refrained from giving an insult to one who is a consecrated Bishop, personally appointed and entitled thereto by his Queen. It is no wonder that such an outrage to their Bishop caused people to do an act which is so much to be deprecated. I look upon Bishop Twells as answerable for thus giving as great an offence, such as would be likely to raise the religious passions as it was possible to do. He ought at all events to have felt for the unfortunate position in which the Bishop of this diocese is placed. What the real offence is that the Bishop of Natal has committed, that he should have brought against him these insults, I cannot tell. I do not pretend to be religiously inclined, perhaps I am not imbued with so much religious feeling as I ought to be, but it does appear to me that the Bishop of Natal is exercising the intellect which God has given him in a prayerful search after truth, and that seems to me to be the offence which he has given to the other party.

Mr. Justice CONNOR said a good deal had fallen in the case which was calculated to raise strong passions, and it was much better for the bench to abstain from any comments. He had only to say, with reference to the order of the 26th June, that there had been an occupation to a separate congregation ever since May last year, and when on the 27th, when he found gentlemen swearing upon matters of law, when he found two gentlemen swearing on one side that they were the churchwardens and two on the other that they were churchwardens, he considered that the two separate congregations had each a separate position, and should be kept at arms' length from each other. He therefore made the order allowing all the facts in dispute to be discussed. The rights of the laity, as well as the rights of the clergy, were involved in this matter. The one side had as much right as the other to say that it was against their consciences that the rite of confirmation should be performed by a certain Bishop, and they had also as much right as the other to reject the Bishop they did not choose to have over them,

The full Court, therefore, concurred in the fine.

## MONDAY, JULY 1, 1867.

F. J. YARDLEY *vs.* JOSEPH WRAY.

Mr. SHEPSTONE, at the request of the Registrar of the Court, read the petition of the above F. J. Yardley praying that an attorney might be appointed him for the purpose of suing the above named Joseph Wray for the sum of £37 4s., and being an amount due him for labour done. The affidavit stated petitioner's inability to pay for the services of a professional man.

The COURT ordered the petition to be referred to the gentleman next on the list.

*In re* NATAL FIRE ASSURANCE AND TRUST COMPANY.

Mr. SHEPSTONE appeared in the above matter stating that the time appointed by law for the paying of the first dividend in the liquidation of the debts of the above company had lapsed on the 28th June, 1867, and applied for an extension of time putting in the report of Mr. G. C. Cato, the official manager, stating that the liabilities of the company amounted to £48,000, but that the amount of debts now proved did not amount to £1,300, and further that at present the funds in hand would not pay a dividend of 1d. in the £.

The COURT postponed the date for the payment of a dividend in the above matter until further order.

## TUESDAY, JULY 2, 1867.

MASTER'S REPORTS.

The MASTER reported that in the intestate estate of R. H. Moncrieff the first and final account and plan of distribution framed by the executor had been lodged and duly advertised no objections being made thereto.

The COURT confirmed the account and ordered the proceeds to be distributed.

The MASTER also reported that the first and final account and plan of distribution, filed in the estates of R. G. Wadham and his widow, had been duly lodged and advertised, &c.

The COURT, confirmed the account, and ordered the proceeds for distribution.

BROWN & CO. *vs.* THOS. BOND & CO.

Mr. Walker was to have applied for the confirmation of a provisional order granted for the sequestration of the estate of the above defendants, but now asked, as some of the circumstances in the case were different, that the application might stand over till the last day of term. Both parties consented to that arrangement.

The matter accordingly stood over till the last day of term.

GRANT AND FRADD *vs.* HARRIS AND MATTHEWS.

Mr. SHEPSTONE applied for the confirmation of a provisional order, granted by the Chief Justice as the Circuit Court judge at Durban, last month, for the sequestration of the estate of defendants, who had left the colony, being formerly hotel keepers at the Umgeni village. It was stated that the defendants had removed from the colony with intent to defeat their creditors, and that a sum of £104 11s. 6d. was due the plaintiff on a mortgage bond, bearing interest at 12 per cent. per annum.

The matter stood over till Tuesday next to see whether the affidavit of petitioning creditor could be supplemented by stating whether there were any other creditors besides those before the Court. The Chief Justice considered that leaving the colony was an act calculated to defeat a creditor, and therefore an act of bankruptcy, but Justices Connor and Phillips did not think a secured creditor could apply under the circumstances disclosed for

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the sequestration of defendants' estate, or that an act of bankruptcy was shewn in the affidavit before the Court.

NATAL BANK *vs.* WATSON AND SONS.

Mr. BUCHANAN applied for the confirmation of the provisional order granted for the sequestration of the above estate.

The COURT confirmed the order as prayed, and adjudged the sequestration of defendants' estate.

NATAL BANK *vs.* WILLIAM WATSON,

On the application of Mr. Buchanan, the Court also confirmed the provisional order granted for the sequestration of the above defendant's estate.

*In re* ESTATE OF HINES AND ADLER, AND W. H. ADLER'S PRIVATE ESTATE.

Mr. COOKE appeared for Mr. W. H. Adler, and applied for his release and discharge, as regarded his own private estate, and as a partner in the firm of Hines and Adler. Mr. Cooke put in the necessary documents, and from the trustee's report it appeared that there would be no dividend in the estate, Mr. Hines, since dead, having absconded with the goods.

Mr. Adler stated, in answer to the Chief Justice, that he was here in Maritzburg, and did not hear of Hines' departure with the property of the partnership until eight days afterwards, when being in a situation as clerk, and having no means at his disposal, he took no steps to follow Hines. The property at the date of surrender was only worth £1.

The CHIEF JUSTICE said that if he were sitting alone he would send Mr. Adler to jail for six months.

Mr. Adler, on being further questioned, stated that after dissolving partnership both he and Hines had come to town, and he had left the latter to arrange with the creditors and make a compromise, such being the arrangement. He heard no more of Hines, however, until the news reached him that he had left the colony.

The CHIEF JUSTICE thought the applicant, being a partner in the estate, should have taken proper steps when he knew his partner had left with all the goods; at any rate he should have gone to the creditors, that they might have taken steps.

Mr. Justice PHILLIPS said the creditors knew all about it. He did not look upon the case in the same way in which the Chief Justice did.

Mr. Justice CONNOR supposed it was true that the assets had been taken away, and he apprehended that it was true the arrangement at the dissolution of partnership was that Hines should take over the property and pay the debts. Now, although the arrangement did not free the applicant, he must consider everything *bonâ fide*, and he looked upon it as a case of great hardship. No one appeared to oppose.

The COURT granted the order in the partnership estate, although the Chief Justice would have suspended it for a short time.

Mr. COOKE now applied in the private estate for an order. The balance sheet shewed that during a business of 6 months, the insolvent had traded and made losses, &c., so as to be hopelessly insolvent, and yet subsequently he entered into partnership and increased his liabilities.

Mr. Adler said that he wanted his rehabilitation as he desired to leave the colony, and wished the affair settled before he left.

Mr. SHEPSTONE suggested that the insolvent wanted his rehabilitation in case he should die whilst out of the colony.

Mr. Justice PHILLIPS thought if he was insolvent that would be just the time he should like to die. His Lordship also said that if he was Mr. Cooke's client he should blame him for the manner in which the balance sheet had been drawn, which alone caused the present difficulty with the majority of the Court.

Mr. Justice CONNOR observed that the insolvent had started in the month of March with £25, and in October, when in reality the business ceased, he had incurred a very large amount of debts, viz.—£317, and had only £80 worth of property on hand. The surrender was only in January, 1867, and he certainly thought it was too soon for the Court to grant the order of rehabilitation.

The CHIEF JUSTICE did not say there was dishonesty, but the proceedings seemed to have been rash and very reckless.

The COURT suspended the order for three months, giving applicant leave to apply again in September term.

PINSON *vs.* FEW.

Mr. Buchanan appeared for the plaintiff, and Mr. Shepstone for the defendant.

Before Mr. Buchanan began to make his application, Mr. Shepstone objected to the Court hearing it until the costs consequent on a notice of trial given by Mr. Buchanan had been paid. It appeared that the notice had been given to Mr. Walker, whose name still appeared on the record as the attorney in the case, and further that the costs could not be taxed by the Master under the circumstances unless both parties consented. Mr. Buchanan also declined to recognise Mr. Shepstone in the matter.

The COURT said they had already decided the question as to a change of attorney, and they could not possibly deal with untaxed costs.

Mr. BUCHANAN applied for an order setting aside the order of reference in this case; also for leave to set down the case for trial again on the pleadings already filed, as if no such order of reference had been made, or for such other order as might seem just. The application was founded on the fact that defendant had objected to its confirmation. Mr. Pinson's affidavit used in support stated, among other things, that the application for confirmation of the award having been made was successfully opposed, and the award was not yet confirmed, and that since having tried to put down the case for trial the Registrar of the Court had refused to set it down. Mr. B. therefore applied for an order setting aside the award.

The CHIEF JUSTICE observed that Mr. Buchanan assumed the award had fallen through, but it had not. It might be liable to fall through if proper steps were taken. In the case of Murray and Van Prehn the award had been set aside.

Mr. BUCHANAN thought that the setting aside of the order of reference would upset the award.

Mr. SHEPSTONE, in reply, urged that it was impossible to set aside an order for reference as

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it had been acted upon, and the award was filed in Court.

The CHIEF JUSTICE said the arbitrators had made a stupid award which no one could understand.

Mr. SHEPSTONE said that application should have been made to set aside the award. His client further objected to this application as Mr. Pinson had no further interest in the award, having sold it. The affidavit of Mr. Few stated that the plaintiff had made over all his claim, title, and interest in and to the award to T. Bond & Co., who had bought and paid for same. Also that that firm were truly and justly indebted to him in a greater sum than the amount claimed by plaintiff. Mr. S. also read a copy of the cession.

The COURT said that under those circumstances Mr. Buchanan was not in a position to apply in the matter.

Mr. WALKER stated that the cession had been withdrawn, and it was then agreed that the matter should stand over till Thursday to admit of an answering affidavit.

*In re* ESTATE JACQUES.

Mr. SHEPSTONE applied for the confirmation of the liquidation account and first plan of distribution in the above estate.

The COURT confirmed the account and ordered the proceeds for distribution.

*In re* ESTATE JOSEPH DE KOCK, senr.

Mr. BUCHANAN moved for the confirmation of the second account and plan of distribution in the above estate.

The COURT confirmed the account and ordered the proceeds for distribution.

*In re* ESTATE A. P. SYDNEY.

Mr. COOKE applied for the rehabilitation and discharge of the above insolvent, and put in the necessary documents in support. The only debt proved was for £2 4s., and the party proving, had elected himself trustee, without any factious opposition. There would, however, be no dividend.

From the statement of insolvent, it appeared that most of the debts were incurred in and about a ship, of which he had been master, and which had been sold, not realising enough to pay the claims incurred. The applicant wished his rehabilitation that he might go to sea again.

Mr. Justice CONNOR saw that debts had been incurred without there being any reasonable expectation that they would be paid, and the surrender had only taken place five months ago.

The CHIEF JUSTICE would suspend the order for three months.

The order was consequently suspended for the term of three months. There were debts due by insolvent out of the colony which, however, the order would not affect.

*In re* COLONIAL BANK.

Mr. WALKER applied, on behalf of the official manager, in the above matter. By the 26th section of the Winding-up Act of 1866, the debts of companies coming under the provisions of the act were to be paid by dividends, and the time for making the first dividend had expired. There was a sum of £1000 deposited with the Colonial Government, and further sums were coming in, so that a dividend of 1s. in the £ could be paid.

The COURT authorised the payment of a first dividend of 1s. in the £, and granted the customary order on the Treasury for the refunding of the money.

The Court then rose at 5 p.m.

## THURSDAY, JULY 4, 1867.

We now proceed to give two cases which were held over.

BILL OF EXCEPTIONS.—UYS *vs.* VERMAAK

Mr. Walker for the plaintiff, and Mr. Buchanan for the defendant.

The summons commanded C. A. C. Vermaak, C J. Vermaak, J. S. Vermaak, and N. Vermaak, of Vermaak's Kraal, Klip River county, brothers and sons of the late Dorothea A. Vermaak, widow and relict of Tobias Vermaak, at the instance of Dirk C. Uys, and his wife, Dorothea M. Uys, married in community, sister of said four defendants, to shew cause why certain wrongful transfer to and acceptance of said farm by the defendants on or about the 5th June, 1860, by which they are now in possession of same, should not be reduced or set aside on the grounds of a child's portion of the same, being the due inheritance of said D. M. Uys, as daughter of said D. A. Vermaak and Tobias Vermaak, and co-heiress with said defendants, and by said D. A. Vermaak in her lifetime, wrongfully and fraudulently transferred to the said defendants without the consent of said D. M. Uys or her husband, or the sum of £1,000 as and for damages.

The declaration set forth that on the 11th day of May, 1862, a certain grant was made by the then Lieutenant-Governor in favor of C. T. Vermaak, defendant's father, of said farm, Vermaak's Kraal. That at that time D. A. Vermaak was living in community as the spouse of the said C. T. Vermaak, who shortly after died, leaving said D. M. Uys and said defendants legitimate children, the said C. T. Vermaak leaving a will, by which he appointed his said spouse, D. A. Vermaak, executrix of his said estate for the general benefit of his children. That all the children of said deceased were equally entitled to like shares in his inheritance, but that the said D. A. Vermaak fraudulently put up for public sale in May, 1865, the said farm, for the purpose of illegally benefitting the defendants, and to the loss of her other children, and without their consent; and did illegally buy it in for her own account at a vile price, to wit, the sum of £80 5s. That the plaintiffs have been greatly injured by said sale, inasmuch as the farm was worth a much larger sum. That the above was done with the concurrence and contrivance of the said defendants for the purpose of despoiling the other children, whereupon the plaintiffs prayed that the said farm may be declared an asset in the said estate of said C. T. Vermaak.

Mr. BUCHANAN then read his exceptions as follows:—

That the declaration is vague and irregular inasmuch as it fails to set out the residence of the plaintiffs, and whether they live within or without

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the jurisdiction of this Court. Second, that the estate of the late D. A. Vermaak has been placed by an order of this honorable Court, dated 9th August, 1865, under the administration of John C. Walton as executor dative, and that by virtue of said order said J. C. Walton is the legal claimant and alone entitled to institute proceedings for the recovery of the said farm for the benefit of all the heirs and creditors of the said estate.

The plaintiffs' reply was that the exceptions were untenable, and merely made at the last moment to delay the plaintiffs in the prosecution.

It appeared that Mr. Walker was not in the case.

Mr. Justice PHILLIPS did not see how the exceptions could be maintained.

The COURT at once overruled them with costs.

INSOLVENT ESTATE OF ZEEDERBERG.

The Acting Attorney General Cope appeared for Mrs. Zeederberg, and Mr. Shepstone for the trustee.

The ACTING ATTORNEY GENERAL said this was the renewal of an application made at the end of last term, and was to enable Mrs. Zeederberg to prove a claim in her husband's estate by virtue of an ante-nuptial contract. The claim was rejected by the Master, hence the present application. According to Mrs. Zeederberg's affidavit, it was stated that the estate was indebted to her in the sum of £17,000, the value of certain lands settled on her by her husband upon their marriage, and she now sought to have that claim acknowledged. The marriage contract was dated 14th August, 1865. The whole of the property was, with the exception of £200 worth, mortgaged at the time the ante-nuptial contract was executed.

The CHIEF JUSTICE: We have nothing to do with that.

Mr. SHEPSTONE: No claim by a wife can prevail against the creditors of the husband.

Mr. Justice CONNOR: If that is laid down, you should cite your authority.

Mr. Justice PHILLIPS: I suppose you argue that Zeederberg was not giving his own property away, but that of his creditors.

The CHIEF JUSTICE: It is perfectly plain that this contract cannot prevail against the mortgagees. In the event of Zeederberg's death the property would have gone to Mrs. Zeederberg, but subject to the mortgages.

Mr. SHEPSTONE: Up to what amount is she to prove? The mortgagees have already proved, and if Mrs. Zeederberg proves, there will be a double proof on the same property.

Mr. Justice CONNOR: Your present position does not go against the deed in any way.

The CHIEF JUSTICE: I would allow Mrs. Zeederberg to prove to the amount according to the value now set on the property, namely £11,005.

Mr. Justice CONNOR: We have nothing to do with the value except as to the amount it entitles her to vote for. I do not see what harm an order to prove would do if you are going on with the action.

The ATTORNEY GENERAL: I am entitled to shew that the property is being sold in such a way as to be injurious to my client.

The CHIEF JUSTICE: The Court seems to be of opinion that you should be allowed to prove your claim, the amount to be settled hereafter, and without prejudice to any question of preference. Mrs. Zeederberg to prove for herself and children.

Order accordingly.

COLONIAL LAND COMPANY.

On the application of Mr. Walker, an order to wind this company up was granted.

PINSON *vs.* FEW.

Mr. BUCHANAN again renewed his application in this case, and put in affidavits supporting it. These were read, but the Court refused to make any order, and virtually recognised the cession, which is now the property of the creditors of Bond & Co.

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## TUESDAY, JULY 9, 1867.

PEACE, BLANDY & CO. *vs.* T. IRELAND.

In this case the plaintiffs sued for a writ of civil imprisonment against the defendant, who was lately a partner in the firm of Cullingworth & Co., of Durban, for non-payment of the judgment of the Circuit Court of the sum of £43 1s. 10d., and £3 9s. costs.

Mr. Buchanan appeared for the plaintiffs, and Mr. Walker for the defendant.

At the suggestion of Mr. Justice Connor, Mr. WALKER held that the record of the Circuit Court was not a record of the Supreme Court, and also that the copy of the record was informal.

The CHIEF JUSTICE said that according to Menzies' reports it was not necessary to serve on the defendant a copy of the record.

There being no allegation in the writ that the judgment had been obtained against the defendant, and the Court holding that the member of a firm could not be imprisoned on a judgment obtained against a firm, the case was dismissed, with costs.

WILLIAMS AND CATTELL *vs.* BROOKS AND FRASER.

Mr. Moodie for plaintiffs, Mr. Buchanan for defendants.

The defendants were summoned to shew cause why they should not be committed for contempt in resisting the entrance of the Sheriff to the Cathedral.

The CHIEF JUSTICE: I thought we had done with this affair?

Mr. MOODIE proceeded to read the notice summoning the defendants, and also the affidavits on which the order was made by the First Puisne judge.

Mr. Justice PHILLIPS: What is the date of the contempt?

Mr. MOODIE: The 29th and 30th June.

Mr. Justice PHILLIPS: All that came before us last time.

Mr. MOODIE: No, my Lord. The last case was for contempt of the order of the 26th June. This application is made in consequence of the Sheriff being actively resisted in the execution of his duty.

Mr. Justice CONNOR: Is there any occasion to press this matter?

Mr. MOODIE: I appear here not only as a duty to myself and the profession, but as a duty to the community and to the Court that its orders should be respected.

The CHIEF JUSTICE: The Court can take care of itself.

Mr Justice PHILLIPS: I do not see how Dr. Cattell can appear. I understand he has been removed from the office of churchwarden by the Commandant, it being contrary to the articles of war that he should hold such an office.

Mr. Justice CONNOR: I should have thought your clients would have been satisfied with the decision in the last case. If you appear at the instance of your clients of course we must hear you.

Mr. MOODIE then read the Sheriff's return setting forth that he had been resisted in the execution of his duty.

Mr. Justice PHILLIPS: All these matters came before us last court day, and the parties were fined. This second application appears to me malicious, harassing, and vexatious, and so far as I am concerned I shall dismiss it with costs.

The CHIEF JUSTICE: I shall certainly do the same.

Mr Justice CONNOR: It is unfortunate the application should be repeated though I see no necessity for saying it is dismissed with costs. I simply dismiss it.

Application dismissed with costs.

The Court then rose.

## THURSDAY, JULY 11, 1867.

GRANT AND FRADD *vs.* HARRIS AND MATTHEWS.

Mr. SHEPSTONE prayed for the compulsory sequestration of the estate of the defendants, and read the petition of the applicants.

Mr. Justice CONNOR doubted whether the applicants had a right to say that the defendants had gone away with the intention to evade their creditors.

Order granted.

MARINE INSURANCE COMPANY *vs.* W. M. COLLINS AND JANET COLLINS.

Mr. SHEPSTONE moved, on behalf of Mr. Goodricke, for a writ of civil imprisonment against the above defendants, they being in default of a judgment of the Supreme Court on a bill for £117 10s.

Mr. Justice CONNOR: Have you authority to arrest a man and woman.

Mr. Justice PHILLIPS: You ought not to have, since women are scarce in this colony.

Mr. SHEPSTONE: I told Mr. Goodricke I did not think the Court would grant it.

Mr. Justice PHILLIPS: I do not think Mr. Goodricke would wish to separate a man and his wife.

The CHIEF JUSTICE: The application is granted against the first defendant.

A BACHELORS' BALL.

WILSON AND CO. *vs.* L J. ROLLESTON AND A. MESHAM, executor of the late H. C. Tomlin.

This case created no little amusement in Court.

Mr. Moodie for the plaintiffs, and Mr. Shepstone for the defendants.

The plaintiffs sued the defendants as the representatives of a bachelors' ball given in the city in September, 1865, for goods supplied consisting of Liverpool soap, sherry, claret, brandy, biscuits, Price's sperm candles, and gin, amounting to £22 5s. 5d., including two years' interest.

The CHIEF JUSTICE: These bachelors appear to have gone on the spree. (Laughter.)

The first defendant was in default, not having pleaded, and the second pleaded a general denial.

The CHIEF JUSTICE: Mr. Rolleston cannot be in default, he is in Court.

Mr. SHEPSTONE: There is nothing in the rules of Court against his so doing.

Mr. Justice CONNOR: He is in default and cannot appear, but there is no reason why he should not purge the default.

Mr. Wilson was then sworn, and stated: The goods were supplied on the 21st and 28th Sept.

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1865, to the order of Mr. Rolleston and Mr. Tomlin. They were charged at a low price, because it was expressly understood to be a cash transaction. Not having received payment I spoke to Mr. Rolleston sometime after and told him I should have to charge interest, and he consented. Part of the goods were delivered at the residence of Mr. Shepstone, and the rest at the Legislative Council Chamber. They were delivered in consequence of instructions from Mr. Rolleston and Mr. Tomlin. I have been compelled to take this step.

Cross-examined: It was stated by both that the goods were required for a bachelor's party or ball.

Mr. Justice PHILLIPS: Married men dare not have done this. They would have no peace from their wives if they did.

Mr. SHEPSTONE: Bachelors generally do pay for their balls, and in this instance I believe every subscriber has paid.

Mr. Justice PHILLIPS: I see there is some soap in the bill. Do bachelors require that? (Laughter.)

Cross-examination continued: I believe the goods were applied for the purposes of the ball. They said they were appointed by the committee to get the wines. They also showed me the names of the committee. They did this because I had at first declined. I only supplied the goods at the request of Mr. Tomlin. Mr. Rolleston came first, but I declined to have anything to do with it. They said they would pay me immediately. It was understood they were to pay in cash out of the funds. I sent the account in to Mr. Shepstone, jun., as Mr. Rolleston said he had the money.

Mr. Justice PHILLIPS: Ought you not to have set forth the names of the committee?

Mr. Justice CONNOR did not think that was necessary.

Witness: I never sent the account in to Mr. Mesham as the executor of Mr. Tomlin.

The CHIEF JUSTICE: I wonder the subscribers do not pay Mr. Wilson.

Mr. SHEPSTONE: As one of the subscribers I may say that I was £30 out of pocket by the ball.

Mr. Justice PHILLIPS: How many subscribers were there?

Mr. MOODIE: Twenty-two.

Mr. Justice CONNOR: To whom did you give credit?

Witness: To the subscribers of the bachelor's ball, through Mr. Tomlin and Mr. Rolleston. I trusted them both.

The CHIEF JUSTICE: Who ordered the soap? (Laughter.)

Witness: Mr. Rolleston.

Mr. Justice PHILLIPS: The question is who used it? (Laughter.)

Mr. SHEPSTONE: It was used for scrubbing the floor.

Mr. Justice PHILLIPS: I was in hopes it was used by the bachelors to wash with. (Laughter.)

The CHIEF JUSTICE: How much soap was used?

Mr. Justice PHILLIPS: We can guess at that if we knew how many bachelors there were.

Mr. Justice CONNOR: Who ordered the wine?

Witness: Mr. Tomlin.

The CHIEF JUSTICE: Perhaps the committee would like to avail themselves of the benefit of the winding up act. (Laughter.)

Mr. SHEPSTONE applied for absolution from the instance on the ground that the evidence went to shew that the goods were supplied for a special purpose, and further that defendants were only sureties for the payment of the debt, and they had therefore been wrongly sued. The plaintiff should have gone further and set forth that the subscribers had been sued and had not paid. He appeared for the defendants only, and not for the subscribers or the committee, and he had to express his regret that Mr. Wilson had not been paid before.

Mr. Justice PHILLIPS: If the ladies you invited knew of this they would have paid it themselves. They will be very slow to accept bachelors' invitations again.

Mr. Justice CONNOR: There is certainly evidence of a contract by Mr. Tomlin.

Mr. Justice PHILLIPS (to Mr. Shepstone): You do not expect any one supplying goods under those circumstances to look to twenty or thirty different people for payment.

Mr. SHEPSTONE: Until the subscribers have been excussed they could not come upon us individually.

The CHIEF JUSTICE: It is exceedingly hard that a tradesman supplying goods in 1865 should have to wait till 1867 for the money.

Mr. SHEPSTONE: It is also hard that we should have to pay individually.

Mr. Justice PHILLIPS: It would have cost you less money and trouble to go round and collect the money than to come here and dispute the account.

The application was refused.

Mr. SHEPSTONE then called Mr. Rolleston, who stated: I remember certain goods being purchased of Mr. Wilson for the bachelors' ball. I went first to Mr. Wilson, and he told me he would have nothing to do with it. Mr. Tomlin then went alone. I was not requested by any one to go. I was one of the committee. I went as representing the ball committee. I was there when Mr. Tomlin was tasting the wine. It was understood to be ordered on behalf of the committee. It was to be paid for out of the subscriptions.

The CHIEF JUSTICE: Who was it to be paid by?

Witness: The representatives of the ball.

Mr. Justice PHILLIPS: I suppose it did not matter who it was paid by so long as you got the wine.

Witness: I told Mr. Wilson, as he had been kept out of his money so long, he ought to be paid interest.

Mr. SHEPSTONE: As a matter of fact the subscribers have all paid their subsciptions, but much more was spent than was received.

The CHIEF JUSTICE (to witness): Did you pay your subscription?

Witness: I did.

The CHIEF JUSTICE: Who to?

Witness: To myself. (Laughter.)

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Mr. Moodie: The plea that subscribers are liable takes me by surpr se.

The Chief Justice: I do not think you have proved that the defendants are jointly and severally liable.

Mr. Shepstone: The credit was not given direct to Mr. Tomlin, and hence I argue that the subscribers are liable.

Mr. Justice Connor: Mr. Wilson would have enquired whether the defendants had authority if he intended to give credit to the subscribers.

The Chief Justice: There must be judgment for the plaintiff. A number of gentlemen appear to have subscribed for the purpose of giving a ball; they appoint a committee, and the defendants, who were members of that committee, go to the plaintiff and order certain goods. The evidence goes to shew that the wine was not contracted for by Mr. Rolleston but by Mr. Tomlin, but there is evidence to show that Mr. Rolleston is liable for the soap and candles. They cannot be jointly and severally liable, but they are liable *pro rata*, share and share alike.

Mr. Justice Connor concurred.

Mr. Justice Phillips: It is most disreputable to the parties concerned that the case was brought into Court. It was not the payment and costs which the defendants would suffer, but they might depend that for the future no ladies would accept their invitations to balls, and if they did they would be unable to give them anything to drink.

Judgment accordingly.

## TUESDAY, JULY 16, 1867.

### MASTER'S REPORT.

The Master reported that in the matter of William Morris, plaintiff, and Wm. Achterman, defendant, he had sold a certain piece of land in the defendant's estate for £105, on which there were two mortgages of Messrs. Raw & Wilkinson, amounting to £1,144 7s. 6d., which mortgages were ceded for a further amount to the L. & S. A. Bank. He prayed order of Court to give transfer.

Order granted.

### BENINGFIELD & SON *vs.* R. HARRISON AND J. R. SIMPSON.

This was an application for civil imprisonment against the two defendants, provisional judgments in the Magistrate's Court having been obtained against them for the balance of a promissory note for £37 16.

Mr. Shepstone for the plaintiffs.

Mr. Walker appeared for Simpson, and Mr. Harrison appeared in person.

Mr. Harrison explained to the Court that £30 of the amount had been paid, and he considered the plaintiff's attorney was dealing harshly with him in pressing for the balance. He had moreover to maintain that Mr. Shepstone had, when he received the £30, entered into an implied contract, and further that if he did not chose to do so he could have returned the money and sued for the whole amount. He contended that Mr. Shepstone took the money under certain conditions, and now he had broken faith by asking for an order for civil imprisonment. Defendant considered he was the dupe of the plaintiffs' attorney, who now sought to make him a victim.

Mr. Shepstone said that he was acting under instructions from his clients, who insisted on having a settlement.

Mr. Justice Phillips said if a man could not pay he should be very loth to send him to gaol; but if he would not pay he must go.

Mr. Harrison assured the Court that he could not pay, and that to pay the £30 he had to part with his piano, which was the means of his getting a living.

Mr. Walker thought it was sharp for the plaintiffs' attorney, after he had got £30, to go on for civil imprisonment.

Mr. Justice Phillips: He must do as he is told, or he loses his clients.

Mr. Shepstone undertaking to forego the costs, amounting to nearly £20, the Court ordered that decree of civil imprisonment should be stayed till the first day in next term.

### J. C. BOSHOFF *vs.* G. C. CATO AND A. MARTIN, trustees in the estate of Zeederberg.

In this case Mr. Acting Attorney General Cope, instructed by Mr. Fisher, appeared for the applicant and Mr. Shepstone for the respondents.

The notice served on the respondents by Mr. Boshoff was that with reference to the mortgage bond held by the applicant upon and over the property No. 26 Loop-street, in this city; that as they had declined to comply with the various requests and offers already made on his behalf as mortgagee, they were requested to sell such property forthwith in one lot, discharged from such mortgage; or, if otherwise they still determined to sell the property in subdivisions, then that the same be sold as subject to such mortgage bond over the whole of said lots, and upon terms of payment to be approved of by the said applicant, and that, in the event of their declining to comply, application would be made to the Court for an order compelling them to, and condemning them to pay all costs incurred.

The application was supported by the following affidavit and correspondence.

Mr. Boshoff in his affidavit stated that he was the holder of the said bond, being a first charge upon and over a certain piece of land belonging to the said estate, containing one acre, three roods, and one perch. That deponent called upon the said trustees to sell the said property so mortgaged to him in one lot, discharged from his bond, or if in more than one lot then subject to the said mortgage over the whole of the subdivisions, that various replies had been received, but that the trustees had failed to carry out the sale in any such manner, and deponent has consequently been hitherto unable to obtain payment of his said debt and interest, or to have the property sold, and has in consequence sustained much expense and loss. That in his judgment a sale of the said property in separate lots, except subject to the entire bond over the whole of them, will be prejudicial to his interests and rights, and he has therefore refused his consent to a sale in the manner proposed by the trustees.

The first letter was from Mr. Fisher, requesting

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the trustees to sell the property at once, discharged from the bond.

The reply of the trustees requested the matter to be postponed till after a meeting of creditors.

Mr. Fisher then wrote on the 17th of April, informing the trustees that he had carefully perused their report in the estate, and had come to the conclusion that he should best consult his client's interests by calling upon them to sell the property at once in one lot, and in the following terms, namely, ten per cent. cash, and the remainder in three equal instalments at four, eight, and twelve months, bearing interest at ten per cent. per annum.

The trustees replied that they proposed to submit the property to public competition on the 27th May, in four subdivisions, with the proviso that if the subdivisions sold did not realise a sum sufficient to cover the bond, they would put the erf up as a whole.

Mr. Fisher then wrote that it appeared to himself and Mr. Boshoff that the proposed sale might injuriously affect his rights, if effected in more than one lot, as he would, in case the property was sold in such subdivisions, have to be secured by four mortgages, instead of by one for the entire sum, he was therefore instructed to inform them that he could not consent to the erf being subdivided nor to discharge his existing mortgage over the whole for any such proposed subdivisions; consequently, were such sale to take place, the respective purchasers would have to conjoin in one bond for the whole amount, as against each of them respectively, as well as against or upon the entire erf, the creditors would therefore fully understand what the result of such proposed subdivision would be.

Notice was then served on the respondents on the 16th May, that they were not to sell the property in subdivisions discharged from the mortgage.

The respondents replied that in consequence of the notice they had withdrawn the property from sale for the present, at the same time they were willing to sell the property in subdivisions discharged from the bond.

Mr. Fisher then wrote that, as they had declined to accede to his client's wish of offering the erf in one lot discharged from the bond, he was instructed to request that they would at once pay him the principal and interest due to him by virtue of said bonds and costs.

The reply was that the trustees were willing to sell the erf in subdivisions, or as a whole, whichever obtained by public competition the highest price, but they could not accede to the proposal to pay the amount of the bond, as there were at present no funds in the estate.

Mr. Fisher afterwards wrote a final application to sell, as required by his client, to pay the amount, or to abandon the mortgage.

The trustees replied that they regretted they could not accede to any of the proposals submitted, that they had discretionary power from the creditors to subdivide when they considered it to the interest of the estate to do so, and in their opinion such subdivision would be in no way detrimental to the interest of the mortgagee. Time would therefore be saved if the mortgagee would make application to the Court if he felt aggrieved by their line of action.

The Acting Attorney General urged on the Court that, inasmuch as his client had advanced the money in one lot, he had a right to have it sold as one lot; it would be neither right nor just that he should be expected to take the bonds of four strangers, who might sequestrate their estates directly afterwards.

The Chief Justice: Suppose that the trustee thinks it would be more beneficial to the estate to sell the property in lots, could you prevent it?

The Acting Attorney General: We say we do not chose to have it sold in that way.

Mr. Justice Connor: You have no right to come into Court and say the property must be sold in one lot.

Mr. Justice Phillips: But you can say to the trustees if you sell in one lot it must be discharged from the mortgage, but if in lots it must be subject to the mortgage.

The Chief Justice I cannot understand how the mortgagee can have any voice in the matter. You can either consent to its being sold subject to the mortgage or to its being sold discharged from the mortgage.

Mr. Justice Phillips: But I do not see how the mortgagee can protect his interest at the sale.

The Acting Attorney General: They are willing to sell in four lots discharged from the mortgage, but my client objected to take four securities instead of one.

Mr. Shepstone: Mr Boshoff is not in Court. He has never called upon us to sell discharged from the mortgage. If he calls upon us to sell we will sell at once.

The Acting Attorney General referred Mr. Shepstone to the correspondence.

Mr. Justice Connor: Mr. Boshoff must positively elect whether he will sell discharged from the mortgage or not.

The Acting Attorney General: He has done so.

Mr. Justice Connor: Then it must be settled by a meeting of creditors how it is to be sold, and if injurious to you your client must come to the Court.

The Acting Attorney General: The creditors have given a discretionary power to the trustees.

Mr. Justice Connor: Then you ought to come here and ask that the resolution be set aside, and give notice to the trustees of your intention to do so.

The Chief Justice said the Court would make no order The law differed in this colony very much from the English law. By the English law the mortgage conveyed the property to the mortgagee, but by the colonial law it was nothing of the kind; the property remained vested in the mortgagor, and if the mortgagee wanted his money he must adopt a certain course. He could not say he would not have the property sold except it was subject to the mortgage. It would be positively injurious if creditors were kept out of their interests if property was to be dealt with as the present applicant required. He must decide definitely which course he would adopt.

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Mr. Justice CONNOR concurred.

Mr. Justice PHILLIPS differed. If the property was sold as the trustees described Mr. Boshoff would not get the estate on which he had lent his money. He thought it should be sold as it was mortgaged.

No order was therefore made.

POSNOTT *vs.* FREEMAN.

Mr. WALKER moved for decree of civil imprisonment against the defendant, on judgment of the Supreme Court.

Mr. BUCHANAN put in plaintiff's sale of claim to E. Campbell, which, taking Mr. Walker by surprise, time was granted to answer.

INSOLVENT ESTATE OF W. H. ABLETT, junr.

Mr. BUCHANAN moved for an order for transfer of property sold on demand of the first mortgagee.

Mr. SHEPSTONE opposing the application, it was ordered to stand over for the production of conditions of sale, mortgage bond, and draft deed of transfer, so as to settle the point as to the purchaser's right to machinery now on the land.

W. MURPHY *vs.* P. C. SUTHERLAND.

Mr. BUCHANAN moved for leave to Mr. W. Smerdon to intervene in defence of an action for the delivery of certain title deeds of a farm in plaintiff's estate, and also claimed by Mr. Smerdon.

Mr. Walker appeared for Dr. Murphy.

The COURT ordered plea to be filed in eight days.

J. B. SIMPSON *vs.* G. STEYN.

Mr. SHEPSTONE moved for the dissolution of a writ of arrest obtained against Mr. G. Steyn on an alleged claim on a promissory note that had eighteen months to run.

Leave was granted to Mr. Walker on the other side to produce answering affidavits.

INSOLVENT ESTATE OF W. J. AIKEN.

The COURT confirmed account in this insolvent estate.

UYS *vs.* VERMAAK.

On the application of Mr. Walker, a commission was appointed to examine Mr. Wessels in the above cause.

PEACE AND BLANDY *vs* IRELAND.

Mr. SHEPSTONE explained to the Court that in this case the judgment was made against the defendant individually, but the Court made no order.

## THURSDAY, JULY 18, 1867.

THEODOR MENNE *vs* DAVID ADAMSON, as trustee of John Fulcher's estate.

This was an action by default, in which Mr. J. B. Moodie appeared for the plaintiff. The defendant did not appear.

The defendant was summoned to grant transfer of the erf No. 2, Block N., in Greytown, and for £50 damages for the non-transfer. It appeared that the property was sold on the 7th May, 1866, by public auction, when the plaintiff became the purchaser; also that the property had been paid for, notwithstanding which, and the fact that the declarations of purchaser and seller were filed in the Registrar of Deed's Office, the defendant, in his said capacity, still neglected to pass transfer of the estate.

Mr. MOODIE put in and read an order appointing defendant trustee, and the various notices served on the defendant in the case, and proceeded to call the following evidence:—

Theo. Shepstone, junr.: As attorney for Mr. Adamson in the early part of March, I wrote Mr. Moodie a letter promising to give transfer if applied for. It was only a question of costs that prevented the transfer. I hold the tranfer deeds now, and have a lien for costs.

William Berning: I am clerk in the Registrar of Deeds office, and produce declarations of sale and purchase of the Erf 2, Block N., in Greytown. The declarations do not aver that the purchase price has been paid.

Mr. MOODIE put in three promissory notes of plaintiff in favor of defendant, endorsed as trustee, and account of trustee, shewing how the estate was paid for.

The COURT, considering the difference in the summons and declaration, which claimed transfer of Erf 2, Block N., and the declaration of purchaser and seller produced by the Registrar of Deeds, which referred to Erf 2, Block U., as a clerical error, allowed the summons and declaration to be amended, and ordered the transfer to be given forthwith, without encumbrances. The Court also awarded costs.

*In re* COLONIAL LAND COMPANY (LIMITED).

Mr. SHEPSTONE appeared in the above matter, and prayed for the appointment of Mr. Behrens—in his capacity as general manager of the Natal Land and Colonization Company (Limited)—as official manager. Mr. S. read the order of Court adjudging the winding-up of the above Company, as also the advertisements inserted in the *Gazettes* of July 9th and 16th, 1867, and petition of the creditors and contributories praying the appointment of Carl Behrens, Esq., in his above-mentioned capacity, as official manager.

There being no objection,

The COURT appointed Mr. C. Behrens, in his capacity of general manager of the Natal Land and Colonization Company (Limited) as official liquidator, and ordered him to report to the Court on or before the 31st inst. as to the present assets and liabilities of the Company, with the number of shares, &c., so that the Court might fix the security to be given by him.

*In re* PRINCE ALFRED HOTEL COMPANY.

Mr. WALKER appeared in this case to move for the appointment of an official manager, and put in the *Gazettes* of July 9th and 16th, 1867, containing the notice that this application would be made; order of Court of July 4, 1667; and petition of contributories and creditors, praying the appointment of Mr. G. C. Cato.

The COURT therefore appointed Mr. G. C. Cato as official liquidator of the Prince Alfred Hotel Company, and ordered him to report as to the assets and liabilities of the Company, and the number of shares and contributories by the 31st inst., for the purpose of fixing the security to be given by him.

W. MURPHY, M D., *vs.* SURVEYOR-GENERAL.

Mr. WALKER, the attorney for plaintiff in the above case, applied to have his name removed from the record as such attorney. Mr. W. read

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his own affidavit in support, which stated that, on communicating with his client the result of the application made on the 16th instant, he (Dr Murphy) was much excited, and told him (Mr. Walker) that he was no more his attorney, and must give up the papers. Subsequently Dr. Murphy, in calling for the papers, behaved in such a manner and with such bad faith, that he (Mr. W.) declined to give up the papers until the costs were paid, which had not been paid, nor security offered for same. Mr. W. had caused Dr. Murphy to be served with notice of this application, after receipt of which he had come to his office and he had drawn out a consent paper for Dr. M. to sign, admitting that he had "changed" his attorney. When, however, he signed it he struck out the word "changed" and inserted over it the word "dismissed." Mr. W. having deposited this consent with the other papers, then ordered Dr. M. out of the office, as he considered that the writing of the word "dismiss" instead of "change" was a great insult.

Mr. Justice CONNOR thought the Court had nothing to do with the matter, as all parties consented.

Dr. Murphy had no affidavit in reply, but wished to speak to the Court about the facts. The bench however refused to hear anything. Dr. M., however, complained of Mr. Walker's conduct, asserting that he had called him a "ruffian" two or three times, and refused to give up his papers. Mr. Walker had sent for a policeman to give him in charge, and when the policeman arrived he had again asked for his papers which he had been refused. He had then left.

The COURT informed Dr. Murphy that if he had any complaints against Mr. Walker he must bring them before the Court in the proper way.

Dr. Murphy promised to lay the whole matter before the bench.

The COURT refused to make any order, all the parties consenting to the change of attorney.

Adjourned till Tuesday next.

## TUESDAY, JULY 23, 1867.

### NO PROVISIONAL CASES!

The Registrar reported that there were no provisional cases.

Mr. Justice PHILLIPS: This being a maiden sitting the banks ought to present us all with white kid gloves.

### POSNOTT *vs.* FREEMAN.

The case of application for civil imprisonment against defendant again came on, Mr. Walker reading his own affidavit to the effect that there was collusion between Freeman and Campbell to do the plaintiff out of his money.

Mr. Justice PHILLIPS: Have you any authorities to show that a client cannot go behind his lawyer and compromise a claim.

Mr. WALKER said he had plenty.

Mr. BUCHANAN said he would like to have the opportunity of answering Mr. Walker's affidavit.

The COURT ordered the case to stand over for a week to enable Mr. Buchanan to reply.

### SIMPSON *vs.* STEYN.

This was a renewed application of Mr. Walker for the confirmation of the arrest of the defendant at the suit of plaintiff, who was the nominal holder of a bill endorsed by the defendant for £213, in consequence of his being about to leave the colony. The bill would not be due for 18 months. Mr. Walker now desired to read the affidavit of Mr. Brunton, of Durban.

Mr. SHEPSTONE: We were only served with that affidavit yesterday morning.

Mr. WALKER then read Mr. Brunton's affidavit, which was to the effect that on or about the 15th July he saw the defendant in Durban, and then and there heard him say that he was about to leave the colony for Algoa Bay by the steamer, which was expected in a day or two.

Mr. SHEPSTONE: We are in a position to contradict that most positively.

The CHIEF JUSTICE: You had better be cautious.

Mr. SHEPSTONE then read Mr. Steyn's affidavit, which was to the effect that the allegations contained in Mr. Brunton's affidavit were utterly untrue. That on the 5th instant Brunton said, in a jocular way, to him that he heard he was going to the Cape, and proposed that if he would pay his (Brunton's) expenses he would go too. Defendant replied, in a simlar jocular way, "Yes, I am going, and when I do go, I'll pay your expenses;" he afterwards seriously told him he was not going. The day following Brunton came to him and strongly advised him to go to Algoa Bay with a lot of mealies, intimating that it would be a good speculation. Defendant replied that he could not go, but that he had offered to pay Mr. Wilkins a pound a day if he would go. An affidavit made by Mr. Jas. Wilson set forth that he had heard Mr. Steyn offer Mr. Wilkins a pound a day to go to Algoa Bay.

Mr. WALKER protested against the defendant making believe that what took place between him and Mr. Brunton was a joke, and he had thought proper to write a letter to Mr. Brunton endeavouring to give the conversation that character, but Mr. Brunton had sent him (Mr. W.) the letter back, with instructions to consider himself employed as his attorney in any action he might bring against him for defamation of character. Brunton considered Steyn's conduct in writing that letter as most impudent. Mr. Brunton had no interest in the bill, and therefore what reason was there for his swearing falsely in the matter. As to Simpson being the nominal holder of the bill, it had been held over and over again that the holder of a bill had power to arrest.

Mr. Justice CONNOR: I doubt whether an arrest can be granted to a nominal plaintiff.

Mr. WALKER: Any person who is the holder of a negociable bill can arrest.

Mr. Justice PHILLIPS: This note has a long time to run, and in all probability Mr. Steyn, had he gone, would be back before the bill became due.

Mr. WALKER: The evidence would show what

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his real intention was, but if he had said that which aroused fair suspicion, the plaintiff could arrest. Suppose a man heard another say that he was going, did the Court mean to say that that was not sufficient to prevent him going over the bar? The rule of court laid down that a man could be arrested if deponent had every reason to believe he was about to leave the colony, and if that was the case surely the defendant could not be allowed to say that it was a joke. They were entitled to arrest him, not for the purpose of paying the bill, but if he will go about the country giving it out that he is going to leave the colony, he must give security for the debt.

The CHIEF JUSTICE: I do not know that you are entitled to security All you want is security that he will be here when the bill comes due.

Mr. WALKER: He has brought all this upon himself.

Mr. SHEPSTONE:. My client has been informed that Mr. Brunton is interested in this matter.

Mr. WALKER: He is not interested.

Mr. Justice CONNOR: I am quite satisfied that this arrest must be discharged. This writ of arrest is granted at the instance of Simpson, who is the nominal plaintiff. It will not be due for eighteen months, and upon that the defendant has been arrested because it has been stated that defendant was going to the Cape, and that he was selling his cart at Durban. The fact turns out the cart does not belong to him, but that he had borrowed it of a friend; it was now admitted that that statement was true, and he was not going to sell the cart. It had been distinctly intimated that he could not go to the Cape. They might make the arrest, but when they came to ask the Court to confirm it they must show that the defendant was going away in such a manner as to affect the rights and interests of the plaintiff. Was there the slightest thing before the Court to show that he was going away not to return for eighteen months? When it was a nominal plaintiff who concealed the real plaintiff, so that there was no remedy for costs, that was a strong circumstance against a confirmation of the arrest.

Mr. Justice PHILLIPS: I agree with my brother Connor. The arrest ought never to have been made. It seems to me to be a sharp trick arresting a man on a bill which is not due for eighteen months. He must have his costs.

The CHIEF JUSTICE: I cannot agree with the majority of the Court. The rule lays down that where a man holds a bill, whether it is due or not, if he has reason to believe that the maker is going to leave the colony, he is entitled to arrest him, whether it is due or not. If a man could go away whenever he liked, without previously making arrangements with his creditors, he might make any number of bills he pleased and he might go away with the view of never to return, and I say it is a wholesome rule of law to enable creditors to protect themselves from risk. He may intend to return, but when he got to the Cape he might change his mind and not come back. Under these circumstances I should confirm the arrest and give bail, to abide the judgment of the Court when the note became due.

Arrest not confirmed.

The Registrar reported that the money was paid into Court.

The CHIEF JUSTICE: It must be paid back to the Sheriff, who will hand it to the defendant's attorney.

### MASTER'S REPORT.

The Master reported the election of Messrs. G. C. Cato and A. Martin as trustees in the insolvent estates of W. Watson, and W. Watson & Sons, and of Messrs. Physick and Welch and J. T. Button as trustees in the insolvent estates of J. W. Winter and the Maritzburg Auction Company.

The Master requested instructions from the Court, in the matter of the £400 which, by order of the Court he had, some time ago, invested in the Natal Fire Assurance and Trust Company. He had applied for both principal and interest, but could get neither. He had once applied for security, and had ascertained that they had, since the last application, mortgaged the premises of the company to the Natal Bank for £2500.

Mr. Justice PHILLIPS: They could not have got their order for winding up from me if I had known it at the time.

The CHIEF JUSTICE: We can do nothing in the matter.

### INSOLVENT ESTATE OF WM. BOYD.

On the application of Mr. Shepstone the first and final account in this estate was confirmed.

### INTESTATE ESTATE OF PEARSON.

Mr. SHEPSTONE applied for leave to mortgage certain property belonging to the intestate estate of the late W. Pearson, of Pinetown, for the benefit of the widow and children, to the Durban Permanent, Building, and Investment Society for the sum of £250, at 12 per cent.

The CHIEF JUSTICE: It is contrary to my creed to grant an order of that kind at such a rate of interest. So long as people borrow at 12 per cent. so long will things be as bad as they are.

The matter was referred to the Master for report.

### REGINA *vs.* SHANDOSS.

Mr. WALKER applied for extension of the defendant's bail bond to appear at the next Criminal Sessions, but, on contending that the bond had not been discharged, because he had not been tried.

The COURT decided that he must find new bail.

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## (BEFORE THE CHIEF JUSTICE AND MR. JUSTICE CONNOR.)

### THURSDAY, JULY 25, 1867.

WHEN ARE GOODS DELIVERED?

A. W. EVANS *vs.* W. AND H. A. W. OAKES.

In this case the plaintiff sued the defendants for the sum of £200 8s. 11d., under the following circumstances. It appeared that in May, 1864, Wm. Glendenning Cox applied to the plaintiff for a certain amount of credit, which the latter consented to give provided he gave him guarantee for the amount. Amongst others the defendants agreed to be responsible for a sum not to exceed the one-third of £900. The goods were supplied in August, 1864, and Cox subsequently became insolvent, owing the plaintiff £650 1s 1d., and, giving the defendants credit for £48 15s., which amount he had received from the estate, the plaintiff now sued for the above amount under that guarantee. This was the substance of the declaration. The defendants' plea was, that admitting that they signed the guarantee they held they were not liable, having been induced to do so by the concealment of the fact that Cox was indebted to the plaintiff at the time they signed the guarantee to the amount of £440, which he was unable to pay, and they submitted that by reason of such wrongful concealment they were not bound.

Mr. Goodricke appeared for the plaintiff, and Mr. Walker for the defendants.

Mr. GOODRICKE moved that the commission *de bene esse* issued from this Court for the examination of Mr. F. E Coulson, of Cronstadt, in the Free State, should be read.

A question arose whether Mr. Coulson had been properly subpœnaed.

Mr. WALKER produced the Sheriff's return, shewing that Mr. Coulson refused to come as a witness unless his expenses were paid.

The CHIEF JUSTICE: There must be some proof of his not being in the colony and obtainable.

Mr. WALKER: Due diligence must be used.

The CHIEF JUSTICE: I do not think so if the witness is in the colony.

Mr. WALKER: I have never been able to get a commission unless the witness is out of the jurisdiction of the Court.

The commission was then read, Mr. Walker reserving his right to argue whether it was legal evidence, and set forth that Mr. Coulson had been duly examined before Mr. Pulleyn.

Mr. Coulson stated: I was in plaintiff's employ in June, 1864, and until the end of February, 1866. W. G. Cox was not a customer of Evans in June, 1864, but commenced in July, 1864, when he was supplied with goods to enable him to commence business in Weenen. Credit was promised to Cox to the amount of £900, and only on condition that he provided satisfactory security to the extent of two-thirds of the amount. A guarantee was given by Oakes brothers, of Richmond, for one-third of any balance due by Cox not exceeding £900, also one by Tunmer, Short, and Buchanan, for the same account. Mr. D. D. Buchanan prepared the bond, and some delay was caused in consequence of Oakes brothers living at Richmond. I gave instruction for its preparation. No credit was given Cox until the agreement for security had been made. I have seen Oakes brothers' guarantee. I made out Cox's account, having kept Mr. A. W. Evans's books. Before Cox's insolvency I saw one of the Oakes brothers, who enquired what was the amount due Mr. Evans, and I told him about £600. He then offered to pay what he considered they were liable for, £200, by paying £100 cash and giving a promissory note for balance. I wrote to Durban on the subject. I made no demand on defendant for account of guarantee, as I understood my principal was going to do so through his attorney.

The CHIEF JUSTICE: Am I to understand that your only defence is that the defendant was indebted to the plaintiff in a large sum of money before the guarantee was signed.

Mr. WALKER: That is the only defence.

The CHIEF JUSTICE: Supposing it to be so, how do you make out that that is a defence?

Mr. WALKER: I can. Do you wish me to go into that?

The CHIEF JUSTICE: It strikes me that the *onus probandi* lies on you.

Mr. WALKER: I accept it. That is the defence which I intend to establish. They have not charged us in the terms of our guarantee. I am ready to go on.

Mr. Justice CONNOR: What is the use of going on when the facts of the case are admitted.

The CHIEF JUSTICE: As I understand the case you admit these goods were supplied.

Mr. WALKER: Not after the guarantee.

Mr. Justice CONNOR: That is not your plea; it may come in under the general issue. You say you did not know he was previously indebted.

Mr. WALKER: I shall shew that we are charged with goods sold before the guarantee was signed. With regard to the commission which has been read I do not see that the three oaths were administered in due form.

The CHIEF JUSTICE: What oaths?

Mr. WALKER: The commissioner, the registrar, and the witness. Such is the form adopted in Capetown, and we cannot do better than follow that.

The CHIEF JUSTICE: I do not know that.

Mr. GOODRICKE put in the order of Court authorising the commission, and held that that was sufficient. He then called,

Mr. D. D. Buchanan, who stated that the guarantee produced was prepared in his office, and was signed by the defendants. It was dated the 10th August, 1864.

Mr. WALKER again contended that the commission was no commission. The order of Court clearly contemplated that a commission should be issued, but they had no proofs that it was held in due form.

The CHIEF JUSTICE: This is the commission.

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The Acting Attorney General, who was in Court, submitted that the commission was in form of a writ, and certain documents were drawn up which ought to be now proved.

The CHIEF JUSTICE: Is not this enough?

Mr. Cope: With submission, I think not. You will find in the precedents the exact form of oath to be administered.

Mr. Justice CONNOR: If we insisted on that we should only be troubling parties unnecessarily.

Mr. W. Gooch was then sworn, and stated: I was salesman at Mr. Evans's store in Maritzburg at the time of this transaction. I have seen this account against Cox before. I have examined it, and it is correct. The first entry of goods against Cox was on the 29th July, 1864, for £444. It is a detailed account of goods supplied at the time. There is another entry on the 9th August, for £96 12s. The arrangement was that he was not to have the goods until the guarantee was signed. The goods were packed up up and put by, and they were not taken away by Cox's wagon till after the guarantee was signed. After Cox's surrender the Oakes's called at the store, and they agreed to pay, but the matter was referred to Durban. The amount they agreed to pay was £100 in cash, and the rest in promissory notes.

Cross-examined: I do not know whether the guarantee was sent to the defendants. I did not communicate to the defendants at any time before the surrender, that Cox had had the goods.

By the CHIEF JUSTICE: The goods were not delivered till after the guarantee was signed.

The following documents were then put in. Letter from Mr. Goodricke to the defendants, giving notice of the amount due. Another letter demanding same. Answer from Mr. Walker, informing Mr. Goodricke that whatever was due would be paid, but that as at present advised they were not indebted at all.

Mr. J. T. Button was then called, and said he was trustee of the insolvent estate of Cox. Mr. Evans had proved a claim in the estate of £650 1s. 11d., on which a dividend of 1s. 6d. in the £ had been paid.

By the CHIEF JUSTICE: This is a balance of account. The account commences 29th July, 1864, and the total amount is £1225 8s.

Mr. WALKER submitted to the Court that the guarantee was dated on the 10th August, and was very peculiarly worded. It said it was a guarantee for goods to be supplied from that date, whereas when the account came to be examined he found that the first item was £444 on the 29th July, and a subsequent one on the 9th August. The guarantee distinctly stated that it was given in consideration of the plaintiff opening an account, and that it was for goods "to be" supplied. One of the defendants would tell the Court that he never heard of those two lots of goods having been supplied when the guarantee was signed.

Mr. Justice CONNOR: We may take it for granted that the defendants did not know of these goods being bought.

Mr. WALKER then called—

Mr. H. A. W. Oakes, who stated:—The guarantee produced is signed by my brother for both of us. We had no intimation of goods having been already supplied. I thought Cox could not get goods without it. Some months afterwards we got a demand from Mr. Goodricke. I then went to the store with my brother and Cox, and said we would pay whatever amount was due; £100 then and the balance in promissory notes. If I had been informed that before the guarantee was signed Cox obtained any goods I should not have signed it.

Cross-examined: When he got the guarantee I understood he was to have the goods. I did not know Cox was insolvent before I heard from Mr. Goodricke.

Mr. J. R. Simpson, accountant, said: I have examined the account between Evans and Cox, and I find there is a balance in Cox's favour of £39 9s. 1d.; that is after striking out the two first items of the 29th July and 9th August.

Mr. Justice CONNOR: Mr. Walker goes on the presumption that the plaintiff had no right to charge those first two items, but as I understand the case there is no evidence that the goods were sold out and out before the 10th August.

The CHIEF JUSTICE: They may have been selected but not delivered.

Mr. WALKER argued that the goods had really been delivered, and he contended that it was a cunning dodge on the part of the plaintiff that the defendants should be made liable for goods for which they had not given a guarantee. In support of this he quoted "Addison on Contracts," page 242. He admitted that there might have been an agreement between the parties, but he also urged that there was a concealment, and the fact that the goods were kept in the store until the guarantee was signed appeared by the account where the goods were charged a fortnight before the instrument was completed. It was clear that the plaintiff intended to keep the purchase of those goods quiet until the guarantee was signed. The fact that the goods were entered on the 29th July proved that they were sold, for it was not necessary that they should be transported from the store.

Mr. Justice CONNOR: But there was no contract until the arrangement was completed.

Mr. WALKER called the attention of the Court to the fact that it only then came out as a secret that the goods were not delivered till the 10th August. He held in his hand Mr. Gallwey's opinion, written before he went away, in which he expressed his belief that it was a case of gross fraud. It was, in fact, the Attorney General's case.

The CHIEF JUSTICE: You say you did not know the goods were selected and not delivered.

Mr. WALKER: Exactly. And I should ask the jury, had this been a jury case, whether they did not consider that a delivery.

The CHIEF JUSTICE: And I should tell the jury it was not.

Mr. Justice CONNOR: What evidence is there that the goods were sold on the 29th July. There is evidence that they were not.

Mr. WALKER: The account says they were sold on that day. We ought to have known something about that private agreement before we signed

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the guarantee. Then there is another point that we ought to have had advice that our guarantee was accepted. In support of this I quote "Chitty on Contracts," page 500. We hear nothing of the acceptance of the guarantee until Cox was insolvent.

Mr. Justice CONNOR: You ought to have pleaded that.

Mr. WALKER: If we are to be held over by the terms of the contract the guarantee was that the goods should be supplied at the very time they were supplied, but they now want to keep back the fact of a prior delivery. It was their duty when they received the guarantee to write and inform the defendants that they had accepted it. If they had done that the position of my clients would have been different, and they would have discovered that a lot of goods had been selected and a debt incurred behind their backs, anticipating their guarantee, and they would have exercised their discretion whether they would allow that guarantee to stand or not. I therefore contend that the guarantee is in direct conflict with the account, and in further support of my case I quote Adams, 279; Van der Linden, 210; and the *9th Jurist*, 64, all of which cases have been collected by the Attorney General on this point.

The CHIEF JUSTICE: You have shown no delivery to Cox of any goods but those of the 29th July and 10th August.

Mr. GOODRICKE: They admit all the items except those two.

The CHIEF JUSTICE: This action is instituted for the recovery from the defendants of £200 8s. 11d., giving them credit for some £48, which the plaintiff has received from Cox's estate. Cox had applied to the plaintiff for credit, which was probably refused. Ultimately the defendants gave a written guarantee that they would be responsible for one-third of any debt Cox might contract with the plaintiff provided that debt did not exceed £900. The defence is that as the account, which has been rendered, shows that some of these goods were supplied on the 29th July and others on the 9th August, and whereas the guarantee was dated on the 10th August, and after the goods were supplied, that therefore the defendants were not liable. I do not agree with that doctrine because the evidence shows that although the goods where charged in the books and packed up they were retained by Evans until the guarantee furnished by Cox was forthcoming. In other words, that although the goods were selected Evans refused delivery until he had been furnished with the guarantee. I therefore hold, and even if there had been a jury I should have laid it down that according to law there was no delivery; the goods remained in Evans's possession until they were delivered to Cox's wagon driver. The defendants may have been misled by the fact that the goods have been charged for prior to the guarantee, but still I do not think they have shown that they are not liable. Mr. Walker has argued that there should have been an acceptance of the guarantee. No doubt there should, and I say that in this case there was. I do not think it at all necessary that Evans should have communicated to the defendants that Cox had brought him their guarantee. I think the evidence shows that the guarantee was accepted. Oakes signed it and gave it to Cox and he heard no more about it, and they must have known that Cox had made use of it. I see no alternative but to give the plaintiff a verdict as claimed.

Mr. Justice CONNOR: I think most people feel a sympathy when a guarantor has to pay his guarantee, but on the other hand it may be taken for granted that a guarantee is not entered into without some consideration, and therefore I must not let sympathy prevent me giving to the plaintiff that which is his due. The guarantee in question is indefinite as to time, and it stipulates that the defendants agree to become security any time for any balance not to exceed £300. It has been contested that the goods were delivered before the guarantee was signed, and a concealment is intimated. I see no concealment. The defence would have been good if it had been made out. But it had been shewn that the goods were not sold, and that they were not taken away until the agreement was completed. Cox merely went into the plaintiff's store and said those were the kind of goods he wanted, and now we are to be told that that is a selling of goods out and out, and therefore that they were not furnished on the strength of the guarantee. There must, therefore, be judgment for the plaintiff.

Mr. GOODRICKE applied for costs.

Mr. Justice CONNOR: If the defendants had been misled, and there was an intimation to that effect in the pleadings, that would have been a fair question for their attorney to argue against costs. But the non-acceptance ought to have been pleaded.

Judgment for plaintiff with costs.

### IMPORTANT CASE.

THE HON. H. L. PHILLIPS *vs.* HUGH GILLESPIE AND ROBT. ACUTT, trustees of the Marine Insurance and Trust Company of Natal.

Mr. Walker for the plaintiff and Mr. Goodricke for the defendants.

Mr. WALKER opened his case by reading the declaration, which was of great length, and may be reduced as follows:—

Hugh Gillespie and Robert Acutt, in their capacity as joint trustees of the Marine Insurance and Trust Company of Natal, were summoned to render to the plaintiff, Henry Lushington Phillips, a certain mortgage bond bearing date the 22nd December, 1864, whereby Henry Pinson bound for the payment of £2000 to J. E. Mears his right and interest in a certain farm called Elands Vley, containing 6324 acres, and situated in the county of Umvoti. Also that the defendants forthwith pay to the plaintiff the sum of £1400 now owing in respect of the said bond to the plaintiff by the defendants, in their said capacity, for damages by him sustained, arising from the unlawful seizing and sale of a certain flock of sheep by the defendants, then well known to be the property of the said J. E. Mears, as also due to the plaintiff by the defendants as and for the price and value of certain sheep sold and delivered to the defendants on plaintiff's account.

The plaintiff then declared that on the 22nd December, 1864, Pinson passed before the Registrar of Deeds his mortgage bond, whereby he charged the said farm Elands Vley with the due payment of £2,000 unto J. E. Mears, his order, executors or assigns. And the plaintiff averred that on the 4th July, 1865, the said mortgage bond was assigned and delivered by the said J. E. Mears to the defendants, in their said capacity, for money advanced to him by them, and that the moneys so advanced and all moneys due and owing to the defendants upon the secu-

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rity of the said mortgage bond were on the 26th June, 1866, fully paid off and discharged, and that from thence up to the commencement of this suit the defendants had not any right or title to the said mortgage bond which, the plaintiff averred, did on the 10th November, 1866, became by cession for valuable consideration his sole property, and of which said cession the defendants had due notice. And the plaintiff averred that the said mortgage bond now wholly belonged to him, and yet the defendants refused to deliver it up to him. Further, that on the 14th March, 1865, the defendants became the owners and proprietors of the said farm Elands Vley, and therefore took upon themselves the payment and discharge of the said mortgage bond, and said sum of £2,000 did become due on the 25th June, 1866, and the defendants had, although requested by plaintiff, refused to pay him the sum of £1,400, the balance remaining unpaid by them of the said £2,000, and now due to the plaintiff. And further, that on the 13th April, 1864, the said J. E. Mears, being possessed of a flock of long-wooled sheep of great value, namely £2,000, delivered the same on hire or lease to the said Henry Pinson, at a yearly rental of £250, and for the payment of the said rental half yearly, as also for the due return of a like flock to be bred therefrom by the said Henry Pinson, or for the payment of the £2000, failing such return, the said Henry Pinson passed as collateral security the said mortgage bond on the 22nd December, 1864. Further, that on the 10th November, 1866, the same Mears, for valuable consideration given by the plaintiff, sold to him the said flock of sheep so hired to the said H. Pinson, subject to the said hiring, and sold and assigned to the plaintiff his full benefit in the said lease and contract, also the lease and the mortgage bond he had therein. And the plaintiff complained that the defendants possessed themselves of the said flock of sheep so hired, and thereafter, with full notice that the said sheep were only hired by the said Pinson, and were in truth the property of the said Mears, wrongfully sold the same and received the money for such sale, and wrongfully appropriated a portion of such moneys, namely £400, to their own use and benefit, and that by reason of the said several acts and defaults of the defendants the plaintiff has been greatly injured and damaged to that amount. The plaintiff further complained that the defendants were indebted to him in the said amount as and for the price of the sheep delivered to the defendants, and for moneys found to be due to the plaintiff by them upon an account stated by their agent, A. S. Physick. Wherefore the plaintiff prayed judgment in the sum of £1400, and that the defendants be adjudged to deliver up the said mortgage bond for £2000 free from all claims, together with costs.

The defendants' plea set forth that, save and except such matters as should be admitted, they denied all the allegations in the declaration. And they specially denied the plaintiff's claim to the right of the said mortgage bond, and that it became his property on the 10th November, 1866. And for a special plea to the first count of the declaration the defendants admitted so much of the allegations as related to the passing of the said bond by Pinson and the cession to the defendants for valuable consideration, and, denying all other allegations, the defendants averred that the right of the said bond belonged to them by virtue of such cession, and by virtue of another duly registered cession of the 4th July, 1865, by the said Mears, to one Joseph Few, for the sum of £500 and interest, and of which said Mears had had the full benefit and advantage; and there is, subject to the deduction of certain credits to be mentioned hereafter, due to the defendants, for advances on security of such bond, in respect of said cession by said Mears, the sum of £1673 0s. 9d, and they specially denied that such account, or any part thereof, was discharged as alleged by the plaintiff. And they further specially pleaded that the plaintiff is the second puisne judge of the Supreme Court of Natal? That on the 6th November, 1866, they obtained, whilst the plaintiff was sitting as said judge, the provisional sentence of the Court against the said Mears, and in favour of the said defendants as holders of two promissory notes made by Mears, of the respective amounts of £162 and £174, and thereon execution was issued on said judgment, and the said bond was, on the 17th November, 1866, attached by the deputy sheriff for any balance there might be due thereon in execution for satisfaction of said judgment debt, and thereafter, to the great damage and injury of the defendants, the plaintiff obstructed and prevented the defendants from realizing the amount of their judgment by the sale of such bond, and the judgment debt in consequence still remains owing. And the defendants further said that no valid cession of the bond had ever been made or registered on same in favour of the plaintiff, and by virtue thereof they had a further just and equitable preferment lien on the same for the sum of £336 and interest thereon. And they further pleaded that in their said capacities they were, by deed bearing date 1st May, 1865, the duly appointed attorneys and agents of the said Pinson, and in that capacity had paid and allowed in account to the legal holder of the said bond in the books of the company the payments stipulated in a certain agreement attached to the said bond, and made between Pinson and Mears on the 13th April, 1864, amounting to £250 per annum, and there remained to be deducted before the before-mentioned sum of £1675 0s. 9d. the sum of £554 8s. 5d., leaving a balance due to the defendants on the 25th May, 1867, the sum of £1,118 12s. 4d. in respect of said advances and considerations, and for payment of which they were entitled to hold the said bond as their security for payment of the said judgment debt against Mears. And the defendants prayed the judgment of the Court accordingly.

Then the defendants claimed in reconvention, and complained that they had suffered damages in the sum of £350 in that the plaintiff, in convention now defendant, with a full knowledge of the said provisional sentence obtained on the 6th November, 1866, thereafter procured, or endeavoured to procure, the said bond of the 22nd Dec., 1864, well knowing the same to be the only available asset of the said Mears to satisfy the said judgment, for his own benefit, and with a view to defeat the said judgment, did obstruct them in disposing of said residue of said bond under execution, to the damage of the plaintiffs in the sum of £350. And the plaintiffs further claimed against the defendant that their judgment debt of the 6th November should be ranked by the Court as preferent to any cession which may be proved by the defendant to have been made to him by Mears, and for an order from the Court authorising them to realize the amount of said judgment by sale of the remainder of the bond after deducting their claim of £1,118 12s. 4d.

To this the plaintiff replied that he denied all the allegations in the defendants' pleas and put them to the proof. And for answer to the plea to the first counts of the declaration plaintiff admitted the two several cessions to the defendants, and also admitted that on the 25th June, 1865, there was due to the defendants, by virtue of such cession, and chargeable against Pinson's bond, the sum of £1007 5s. 3d., but no more. And the plaintiff said that he had given the defendants and the said bond full credit for the same; that the said sum of £1007 5s. 3d., formed no part of his claim in the declaration, and that the said bond was passed only as collateral security for the due return of the sheep of the stipulated value of £2000, and that the defendants sold the said sheep and retained the price thereof and thereout paid all moneys due to them in respect of the two cessions, and thereby rendered the said bond due and payable. And as related to the provisional judgment and the attachment of the bond in execution, the plaintiff said that before the judgment, namely, in October last, the plaintiff was absent from Maritzburg, and during such absence one Wilkins, acting as his agent, unknown to the plaintiff, sold to the said Mears the estate called "The Wilderness" for the sum of £1800, and gave the said Mears possession of the said property; that on his return to Maritzburg he, the plaintiff, confirmed the said sale and agreed with the said Mears to receive in part payment of the purchase money, and at its full ascertained value, the residuary interest of the said Mears in the said flock of sheep and in the said bond. That in the pursuance of his agreement, and after the date of the said judgment, the plaintiff proceeded to the office of A. S. Physick, the agent of the defendants, and obtained from him the then value of the bond and the claim of the defendants against it, which Physick declared to be £1007 5s. 3d., and did

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not include any claim in respect to the said judgment. That plaintiff, on the faith of such representation, concluded his sale with Mears, and allowed him in respect of the said bond the sum of £992 14s. 9d., and that he, thereupon, and before the bond was seized, in the completion of the said sale, obtained a notarial cession of all the interest of the said Mears on the said bond. Further, that the defendants ought not to claim against the plaintiff on the said bond the amount of the judgment, because the promissory notes, in respect of which the judgment was obtained, had been paid by Mears before they matured, and that the defendants took them with a full knowledge thereof. That the said Mears gave defendants notice that he should defend any suit brought in respect of such notes, and that the defendants refrained from bringing their action against Mears for a long period, and that the said judgment was obtained in surprise and during Mears's absence. Further, that after the seizure of the said bond the Sheriff, by consent of the defendants, abandoned the same. Further, that the plaintiff may lawfully pursue his claim without the cession being registered, and that the defendants refused to give him the bond so that it could be registered, although requested to do so. Further, in respect to the plaintiff being a judge of the Court, the plaintiff threw himself upon the Court and prayed that so much of the plea averred be struck out with full costs, because such averments are unnecessary to the validity of the plea, and scandalous, and abusive, inasmuch as they insinuate fraud and corruption against the plaintiff in his office as judge, or else that the plea be amended so that the plaintiff may take issue thereon. Further, that the defendants are not entitled to hold against the plaintiff Pinson's bond. In reconvention the plaintiff pleaded that for the valuable consideration paid by him to Mears, anterior to the said provisional sentence, the said Mears, with the knowledge of the plaintiff, notarially ceded to the defendant the bond of the 22nd December, 1864, that the plaintiff caused the said bond to be seized in execution, that the defendant gave the Sheriff due notice of this cession, and that these were the wrongs which the plaintiff charged against the defendant.

The defendants rejoined that the said bond, by the terms thereof and of the agreement annexed, does not become due until the 13th April, 1869; that under the cession to them they are entitled to commissions on the said amount of £700, and on all renewals due in respect to their advances to Mears till the due date of the said bond or until the said commissions and interest were paid; that the said judgment is still recorded against Mears, and cannot be questioned by the plaintiff, and that the levy made on the bond was a preferent claim to an unregistered cession.

The sur-rejoinder of the plaintiff was that the defendants had been paid their commission on the said sum of £700, and were not entitled to any further charges under the said cession than they had obtained credit for in plaintiff's account attached to this application, and denied that there had been any renewals of promissory notes in the said cession.

The CHIEF JUSTICE: If I understand the case aright the plaintiff says he had a mortgage bond to secure the restoration of the sheep, and in addition to that he had the bond too, but the bond has got into the possession of the company and he wants that bond, but if he gets the price of the sheep I do not see how he can get the bond, that being for the restoration of the sheep.

Mr. WALKER: We want to be placed in the position of Mears before he ceded the bond to the plaintiff.

Mr. Justice CONNOR: The fact is you want £1400 and the bond to be declared executable.

The CHIEF JUSTICE: If you get the money you do not want the mortgage bond, but if you do not get the money you want the bond to secure yourself.

Mr. WALKER: That is so.

Mr. WALKER then read the following documents bearing on the case:—

Mortgage bond from Pinson to Mears for £2000, dated 22nd December, 1864. Cession of said mortgage bond from Mears to Few, ceding the remainder of Pinson's bond for £700, dated 4th July, 1865. Agreement between Pinson and Mears for the former to hire 2000 sheep, dated 14th July, 1864. Also correspondence between plaintiff and defendants' attorneys.

Mr. Phillips was then sworn, and said:—I am the second puisne judge of this Court, and am the plaintiff in this case. I know Mr. Mears. I now see the cession made by Mears to the Marine Company. I never got it till the 24th November last, when Mr. Physick told me the Sheriff had seized it. I hold in my hand the cession made by Mears to myself. Mr. Walker gave me two cessions, one being a copy of the other. It is dated the 18th November. In consequence of what I heard from Mr. Physick I went to Mr. Walker and asked him if my cessions were made out, and I got them. About three or four years since I sold a place called "The Wilderness" to Thomas Wilkins for £2,800. At that time there were mortgages on it to the amount of £1,600. He was to pay them off. He gave me a house in town, £200 in trade bills, a carriage and harness. I got the transfer of the house in town. I also got the carriage, harness, and trade bills. There was no declaration of the sale and purchase ever made. Before he got transfer of the property Wilkins became insolvent. Mr. Turnbull was appointed trustee of his estate. I sent to Mr. Turnbull and told him how the transaction stood between us, and he said he would consult the creditors whether it should be completed or not. They refused to complete it, and Wilkins asked me if I would hold it over and convey it to anyone he might sell it to for the balance, which was due, namely, £1,600. I kept it for two years and did not sell it. I had to pay interest on the mortgages. In October last Wilkins told me that Fraser was going to purchase it. I thought the matter would be concluded, and went up country on circuit. When I came back Wilkins told me that Fraser could not buy it, and that he had sold the place to Mears for £1,800. There was £1,800 then owing for mortgages and interest. I saw Mears either that day or the day after and asked him how he was going to pay for it. He said he had not cash but he had property that would eventually bring the amount in. He then explained that he had a bond of Pinson's which was now held by the Marine Company, and a bond on another flock of sheep which Bester had hired. He told me what was still owing on the bond held by the Marine Company, and he considered it was still worth £1,100. He said it would be three years before he should get the sheep back again. I agreed with him that if he ceded those bonds to me he should have the property for £1,800 at three years' credit, on paying a rental of nine per cent. I was therefore to have Pinson and Bester's flock and realise them as best I could, and if I got anything over the £1,800 I was to account to him for it. I said before I concluded the matter I would go to the Marine Company and see what was owing to them on the bond they held. I went to the office here and saw Mr. Physick. I told him the arrangement I was

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making with Mears, He went to his books and told me that the bond was worth that day, I think it was £1,004. I went to him afterwards and asked him if he remembered the circumstance, and if he would look at his books and say how he made it up. He said the books were at Durban. I then asked Mears who was his attorney, and he said Mr. Walker. I told him he had better go to Mr. Walker and he would tell him what to do. He asked me if I would go with him and I did so. We went to Mr. Walker and told him everything, and he said it was all right. Mears told Mr. Walker to get the cession made out for him. He did nothing for some time, not until I wished to endorse it, and Mr. Physick then told me it had been given to the Sheriff in execution for some promissory notes of Mears' held by the Marine Company. Wilson told me that the sheep had been sold long since. Mr. Walker told me I was quite safe, and I then wrote to the Sheriff and gave him notice that the bond had been ceded to me. I tried to get my cession registered but could not do so. I got the other cession of Bester's sheep, In my account against the company I give them credit for the first cession, and I charge them with £125, a half year's rent before the bills became due. I believe the sheep were sold on the 25th June, 1866.

Cross-examined: Wilkins sold the property to Mears for me. The sale to Wilkins was cancelled. The only way in which it was cancelled was by a letter from Mr. Turnbull informing me that the creditors refused to adopt the purchase. I considered that a repudiation. I sold the property to Wilkins in January, 1865. He has not paid any money in respect of that purchase or passed any bills.

Did Wilkins give you a bill on England for £400? Yes. Was that in respect of the sale of the farm? One of the mortgagees called in his money, and Wilkins, to pay him off, drew on his father-in-law. I gave the money and the mortgage to the L. & S. A. Bank. Was that bill in part payment of the purchase money? It was in discharge of the mortgage to which it was subject. There is still a mortgage on the property in respect of that bill. So that the £400 bill given and passed to the L. & S. A. Bank was cashed upon the security of a mortgage passed by you. Was there another mortgage on the place? I will explain. A client of Mr. Goodricke's held a mortgage for £400 and pressed me for payment. Wilkins said his father-in-law would take it up. We went to the L. & S. A. Bank. Mr. Ross said if he drew in my favour and I got an assignment of the bond for £400 I could get the money. I did so and sent it to Mr. Goodricke. This mortgage was in existence when I sold the property to Mears. Shortly after the L. & S. A. Bank wanted the money, and another gentleman who had a mortgage on the property for £500 wanted to be paid and I divided the property into two pieces and got a mortgage on each. The bill on England was not paid. Is there still a mortgage due to the L. & S. A. Bank? Yes, for £476 in respect to this transaction. There is a first mortgage on one piece of 48 acres, and a third mortgage on the piece of 31 acres. Wilkins gave me his bill on England shortly after his insolvency. I gave Mr. Goodricke a cheque for the money the day he gave me the bill. Was it known to Mr. Turnbull and Mr. Wilkins' creditors that you received £400 from Wilkins? They had abandoned the estate long before that. Was there any agreement of sale or purchase when you sold to Wilkins. No, but there was a power of attorney. What for? When I left him in possession. Was there any agreement in writing of sale and purchase to Mears? No, except that Wilkins put down a note of the transaction. Was there no agreement in writing as to the sale of the bond and sheep by Mears, no declaration of the purchase or sale? I am telling you that I went to the Registrar of Deeds who would not register the sale and purchase unless the transfer duty was paid. Then there was no transfer of the "Wilderness" from you to Wilkins, none from the trustee back again to you, and none from you to Mears? No, it would have taken upwards of £400 to pay the transfer dues. Was there nothing reduced to writing other than the cession? Nothing, except the heads of the agreement which Mr. Walker took down. And then I must tell you that some time after Mears asked me to give him a memorandum of the transaction, and asked me to sign it on the 10th November; for this reason—there was £60 rent coming due from Bester for his sheep, and Mears wanted to draw the £60, consequently I did not get it. I did not get a copy of the mortgage bond. I never saw it. Mears shewed me a copy at the time the memorandum was made. When you got the cession did you draw the attention of anyone to the fact that there was no mention of any sheep? No, I was to take a personal delivery of Bester's sheep. Was Walker to draw up an agreement between you and Mears from the memorandum he made? I gave him no instructions. I merely asked him to lose no time in getting the cession. He was not to draw up any memorandum between me and Mears. Were you aware that a judgment had been obtained against Mears by the Marine Company at the time? I am not sure. I know that I sat upon the bench when judgment was given against Mears upon two promissory notes, but I forget all about when the cession was drawn up. I do not know whether the agreement was completed before the judgment or after. I know it was on a Saturday. Who gave Mr. Walker instructions to draw up the agreement? I believe Mears and myself both went to Mr. Walker. Was there any conversation at Mr. Walker's relative to the judgment. No, I am positive there was not. If I had remembered it I would have settled the matter rather than have allowed myself to be drawn into any litigation. Was there ever any conversation between you and Mears relative to the judgment? No. Then you went to Mr. Walker's after the judgment had been obtained? I cannot tell you that; if I knew the day I went I could tell. You say it was on the 10th, and the judgment was given on the 6th. Had you not had some conversation on the subject with Mears previous to the 10th? No, certainly not; I did not remember the judgment until after the Sheriff had seized the bond. Do you remember the date when you first went to Mr. Physick on the subject? I do not. Did you

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go to Mr. Physick before you went to Mr. Walker? Yes; we went on the same day. Did you not say to Mr. Physick that you knew there was a judgment against Mears by the Marine Company and you were determined they should not get it? No, certainly not. Was it not subsequently to the judgment, and did you not say that the Marine Company should not get the judgment satisfied till you got your cession? No, certainly not. It is not likely I would go to your agent and say I would defeat your judgment. Did Mr. Physick, at the first interview, refer to his books? Yes, I am positive. Did he tell you positively that a certain sum only was claimed? He told me first what was claimed, but I have forgotten the amount. I then asked him how much it was worth that day, and he gave me the amount on a small slip of paper. Did not Mr. Physick tell you that he did not know the amount, but that if you wished to know you must communicate with the head office? Certainly not. Did he not tell you that he was not in a position to tell you, and that there were certainly commissions to be charged relative to the renewal of Mears's bills? He said he did not know what commission was chargeable, as that depended upon the bond itself. He left my mind in doubt as to the amount of commission due on the bond. I did not communicate with the office at Durban to ascertain in what position the bond stood. Was the judgment on the bond the subject of conversation between you and Mr. Physick? No, I do not think the judgment was in existence then. I think it was the first Saturday in November when Mears was about to go up country. Were you not aware at the time that more than half the sheep were dead? It was a matter of notoriety in the colony; I also knew they were in Mr. Lillingstone's hands and that he was doing well with them. I did not enquire what number of sheep were left. I knew the number would have to be made up when the bond became due. Did not you know that the sheep had been sold long previous? No, certainly not. I understood that Mr. Lillingstone took them and had the clip allowed to him. I had no memorandom of the number of sheep in the possession of Bester. I had the contract entered into between Bester and Mears. It was similar to the one between Pinson and Mears. I also had the memorandum giving Mears a mortgage on Spitzkop in the event of the sheep not being delivered in three years. I made no enquiry as to the number of sheep in Bester's hands. I have received 700 of them. When did you apply to the Marine Company for the bond in order that the cession might be endorsed? I never applied in writing. I did not think it was necessary. It was upon my asking Mr. Physick for the bond to endorse the cession that I found it was seized. Then you had no other private agreement except what you have told me? No. Was there any written agreement with Mears? No, only a verbal promise. I was to stand in his place. Were the sheep ever mentioned when you took over the bond? The sheep were specially mentioned. I saw no copy of Mr. Few's cession when I went to Mr. Physick. Mears told me that the agreement with Bester was exactly like Pinson's. Previous to the cession of the bond I never saw the agreement attached to the bond. Where did you see the bond? I saw it at a committee meeting of your board at Durban. At the time I made this agreement with Mears I had never seen the bond or cession. I remember now I saw it when the Sheriff had it. I had also seen a copy of it in the possession of Mears. I made no enquiry for it at the Registrar of Deed's office. Do you mean to tell me that in a transaction of this kind you had no special agreement, no official copy of the bond, and that you never saw either the agreement or the cession? No. And yet upon that you went to Mr. Walker and instructed him to draw up this cession? Yes. I was aware at the time of the cession to Few. Did you write to the head office of the Marine Company to get a sight of this bond? No, I never did. Nor to ask the particulars about the sheep? No. Nor did you take any means to ascertain whether they were in existence or not? No. Did you not know that the Marine Company were in difficulties? Yes, you told me. Did you not know that application was being made to the Legislative Council for a winding-up act, and that the Marine Company intended to take advantage of it? Yes, you told me they would if I pressed the matter. I knew twelve months ago they were in difficulties. And yet you never went to the Registrar of Deeds' office or took any pains to ascertain whether the documents were in existence or not? No. Did not you know that Mears had no property at the time? I did not know he had, and I expressed myself so to him. Was nothing said between you and Mears as to the amount? There was no amount properly agreed upon. We estimated the amount at £1100. I agreed to take the two lots of sheep together at what was owing on the farm, to give him credit for what the sheep realised and hand over the difference to him. I did not deal with the bond only and not for the sheep. He told me the bond had three years to run. When you took the cession of this bond you knew that it would not become due till April, 1869? Yes. And you took it from Mears on that understanding? There was no condition. I took it upon the supposition that I could not get a single sheep or shilling till the time of hiring had expired. That was the reason he was not to have transfer for three years? Yes. I was then to have the sheep, and if they were not delivered I was to get a pound a head, or £2000. Did not Mears know the sheep had been sold? No. Suppose the bond realised £2000, what was you to do? Keep £1800 and give him the difference. Did you write to Mr. Hoffman respecting the bond? I did. Had you not several interviews with him on the subject? I had. Did you claim at the first interview either the sheep or the £2000? No. I did not then know what my position was. I would have been contented with the cession of the bond. Then you offered to allow this judgment for £140 to be registered third after the £700 and £500, provided your own cession was registered afterwards for the value of the amount due to you? That was all I wanted. Did you not, in a subsequent letter, say that the amount of the judgment was £240? As soon as I heard about the promissory notes and the bond being given in execution for them I went to Mears and asked him about

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it, and he gave me the history of the notes. It was that the bills had been stolen trom him and had got into the possession of the Marine Company. I went to Raw and he corroborated the statement. Mears also said that if I purchased the promissory notes he believed if he went to the Free State he could get £160 for them. I offered to Mr. Hoffman £140 for them. Mears was to go up and recover, and none of us were to have any loss. Defendants were always ready to have my cession registered after their judgment against Mears was registered for the full amount. That was the rock upon which we split; I refused to let it be registered for more than £140. Was it not a mere speculation on your part? I did not know I had the slightest right to realize the bond; I thought I should have to wait till the time was up. It was not till I looked into the matter that I found it otherwise. I thought I could come to an agreement with the Marine. Did they not hold out because they got judgment before you got the cession? I do not know. Did you not know at the time of the negociation that the sheep had been sold? I did. Was it not on your mind at the time you went to Mr. Walker about the cession that the bond was seized in execution? I am not sure that the judgment was in existence then? I put the date at the 10th November, because Mears had to receive the sum of £62 10s. from Bester on that day. If I had known of the judgment I should have told Mr. Walker to get the cession made out at once. Have you sent a copy of the cession to the Marine? I sent you one. Produce the letter? It is amongst a lot of papers I gave you. Is there any copy of that cession in these papers? (handing papers to witness.) Not now, but there was when they went to you. Did you ever send a formal notice of the cession to the Marine? No, never.

Mr. WALKER: I sent it on the 20th November.

Mr. GOODRICKE: You never did.

Cross-examination continued: You remember, when you were on the bench, the Sheriff handing up the bond and asking to whom he was to give it? I do. Did you have any conversation with the Sheriff about the bond previous to that? No, at no time. I am not sure that I did not go into his office and ask him whether it was true that it had been seized, but I had no conversation with him about the bond. Was is not an unusual circumstance for the Sheriff to hand a bond up to the bench? I do not remember he ever asked us before. Did he ever ask the bench at any time, when he had seized a certain security, what he should do with it? Often. I gave the Sheriff notice not to attach it. I have no copy of that notice. I have given no transfer of the "Wilderness." It is mortgaged to Mr. Wyndham for £400. There is £1800 on it altogether. The only two bonds to be paid off is Mr. Wyndham's and the London and South African Bank. I cannot give transfer till the mortgagees are paid off I can pay them off to-morrow if I got the money from you.

Thos. Wilkins was then called, and said: I purchased the "Wilderness" from the plaintiff. I have been in Court and heard part of Mr. Phillips's evidence. I bought it for £2,800. I was to take over the mortgages. After this I became insolvent. After obtaining the property I subsequently sold it to Mr. Mears. Mears said he would arrange with Mr. Phillips as to terms. The sum was £1,800. I am not cognizant of the way in which Mears settled with Mr. Phillips.

Cross-examined: I told Mr. Phillips I had sold the farm to Mears, but I did not know whether he would be satisfied with the security he had offered. Mears was to pay Mr. Phillips, not me. I am quite sure that was all that passed. I am not to get any of this money back again, I am too much in debt. Mr. Phillips is to keep the house I gave him for the "Wilderness." The house was valued at £550. Nothing was said about the value when I parted with it. The transfer was made. I really do not know at how much it was stated in the declaration of seller. I gave him a carriage and harness, but no value was agreed upon. If Mr. Mears pays for the property I am not to get anything by it. Mr. Phillips is to keep the £1,800, house, carriage and harness, and give me nothing. I, therefore, make a loss by the transaction. I told Mears to whom it belonged, and made the best of it. I told him the land would grow 400 muids of mealies, and that in a short time the trees would bear. Mears spoke of a bond, but did not tell me what bond. I did not ask him, but said it would be all right if Mr. Phillips would be satisfied. No bonds were named, nor did he say anything about any judgment against him. I know Mr. Phillips. Do not know that I am on intimate terms with him. I dine with him sometimes, and say "How do you do" when we meet. (Laughter.) Mr. Phillips told me a few days after he thought it would be all right.

James Edward Mears: I live at the "Wilderness." I know plaintiff, and also Mr. Pinson. I have become the purchaser of that property. On the the 17th October, 1866, I went to the Plough Hotel and Wilkins told me the property was for sale. I said I should like to buy it. He said he would sell it to me for £1800. I told him what security I would give for it, and he said I must settle that with Mr. Phillips, and that he would sell it in the meantime. In the event of my not giving security I could keep it at a rental of £6 per month. About the 3rd or 4th of Novemter I met Mr. Phillips. I then told him how I would pay for it. I gave him a mortgage bond which I had got from Mr. Pinson, and which was charged with £700 to be paid by the Marine Company, and another charge of £500 of Few's promissory notes. I also gave him a flock of 1000 sheep let to Bester. Mr. Phillips agreed to take them as payment. I consider Pinson's bond is for sheep, He was to have all my right, title, and interest in these bonds. On my return from Ladysmith I executed a cession in Mr. Phillips' favour. It was done on a week day, on the 15th November, 1866. The "Wilderness" belongs to me, but I have not got transfer.

Cross-examined: Pinson's sheep were particularly mentioned in my interview with Mr. Phillips. I believe so. I cannot speak positively. I cannot give you the conversation. I could not mention any number of sheep as being in existence. There was no agreement between me and Mr. Phillips in writing at that time. I always looked upon the

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bond and sheep as one. I did not shew him any agreement as to the sheep I had left with Pinson at the time, I did not go to Mr. Walker with Mr. Phillips. The agreement between myself and Mr. Phillips was made coming from my house. I met him. I was away at Ladysmith about ten days. I think I met Mr. Phillips at Mr. Walker's after I returned. I told him what I thought my value of the bond held by the Marine Company was. I did not go with him anywhere to ascertain what its value was. I sent him to Mr. Physick. I did not go with him. He was to take both bonds for £1800, and anything he realised over he was to give to me. He did not tell me what the value was before I went to Mr. Walker.

Re-examined: I gave Mr. Phillips Bester's agreement.

Mr. N. D. F. Lillingstone stated: I live near Richmond. I have bought the residue of the sheep in question of the Marine Company. There were 872. I bought them on the 27th June, 1866, for £622 19s. They had been in my possession seven months previously. There were then 1279. 246 were sold by me for the company; they realized £196 1s. 6d.

Cross-examined: I know nothing about the origin of the sheep at all. They were badly scabbed when I got them.

This closed the plaintiff's case.

Mr. Justice Connor remarked that the question before the Court was a simple question of law whether, the sheep not being in existence, the bond was due. There might have been a question as to whether there was anything due by way of damages in respect of the sheep being sold, but that was not before the Court.

The Court adjourned at 5.30.

## FRIDAY, JULY 26, 1867.

PHILLIPS *vs.* THE MARINE COMPANY.

This case was resumed on Friday morning, when Mr. Walker asked leave to call a witness.

Mr. Henry Pinson said: I live in Maritzburg. My affairs were put into the management of the Marine Company sometime back, under terms of an irrevocable power of attorney. In terms of that document I handed over the bonds and part of the sheep, the cause of this action. I could not state how many sheep belonged to Mears. I believe those sheep were delivered to Mr. Lillingstone. With regard to the two notes on which judgment was given against Mears, they were handed over to the defendants; one of them came into the hands of the Marine Company after maturity.

W. H. Fenton said: I know Mr. Pinson. I hold in my hand two promissory notes, both dated 16th January, 1863, and passed by Mears in favour of some one in the Old Colony, one at 24, and the other at 36 months. The first is £162, and the other £174. My brother, who was the manager of the late firm of Fenton and Meets, in the Free State, gave me these bills to do the best for their interests with them. They were for some time left with Messrs. Raw & Wilkinson, who supplied them with goods. Money was wanted to meet bills, and Raw and Wilkinson could not make use of them; they asked me how the money was to be got. As I was Mr. Pinson's manager at the time I told Mr. Wilkinson to give me the bills back, and I would raise some money on them. I took them—there were three at the time—to Mr. Pinson, and pledged them to him for his promissory notes, which I knew would pass in the banks for something like £240. I made an arrangement with Mr. Pinson that these last bills were to be renewed three times if I required them, to enable me to pay the amount back. I knew these bills were the subject of litigation, judgment having been obtained for them against a man named Arrowsmith. I was present when my brother made a tender of the £240 to get the bills back.

Cross-examined: I did not sell the bills out and out. That endorsement is my signature. I endorsed them that they might be sent to the Old Colony for collection. My brother told Mr. Pinson that he was authorised by Arrowsmith to tender the £240. Mr. Pinson said he wanted the whole amount when he could get it. He said he wanted the whole amount, and I told him he could get it from Arrowsmith. I cannot say when I endorsed the bills. I knew I could get the money because I knew that Arrowsmith was threatened with criminal proceedings in the matter. I will not say I endorsed them when I got the money. I did not get any document from Mr. Pinson when I pledged them. I still repeat they were only pledged. I believe I could get the money yet. Either Mr. Pinson, or Fenton and Meets, or my brother, or myself were entitled to get the whole of the money. Mr. Hoffman wrote to me about them. I believe I told him there were three bills. This letter, dated 21st January, 1867, is in my handwriting. It is in answer to a letter written me by Mr. Hoffman. No one paid Pinson the £240, and it was therefore simply a sale by default. I certainly did hand Mr. Pinson those bills myself. No one was present but my brother and myself when he tendered Mr. Pinson the money. I cannot tell you either the month or the year. It would be somewhere between 9 and 4 in the day. I cannot say whether the original notes are afloat.

By the Chief Justice: I became insolvent a long time after I gave Mr. Pinson these bills. They were not proved in my estate. I consider the bills are the property of Fenton and Meets' estate, subject to the payment of £240. If that money was not paid back I suppose the bills become Mr. Pinson's property.

Mr. Mears was re-called, and said: I now see the notes shown to the last witness. They were made by me. There was another, which was given up to the Free State Court. The notes were brought here through Fenton and Meets. They were stolen off my desk.

Mr. Goodricke objected that the plaintiff had no right to go into the question as to how the notes got out of his possession.

The Court overruled the objection.

Witness: A man named Arrowsmith told me he had got the bills. I agreed with him to give him property for them. I did so, and he, unknown to me, put them in his pocket and walked off. I

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obtained an interdict then, and afterwards I found they were in the possession of Raw & Wilkinson, and I gave them notice warning them not to use them. I produce a notice in the papers which I published.

Mr. Goodricke again objected that his client could not be bound by these notices.

The Court again overruled.

Witness: I sued Arrowsmith in the Free State Court for the recovery of the bills. He was condemned within three months to obtain the bills from Natal. Before the provisional judgment on these notes was obtained in this Court I went to Mr. Physick.

Mr. Goodricke objected to the production of the judgment of the Free State Court.

The Court overruled.

Witness: I wrote to Mr. Physick.

The letter to Mr. Physick not being forthcoming, Mr. Goodricke again objected. The Court, he contended, had no right to take evidence on a letter which was not produced.

Mr. Justice Connor: I do not know what you mean by insulting the Court in this way.

The objection was overruled.

Witness: Mr. Physick is well aware of the circumstances of the whole case. I told him I would not pay them. I went up to Ladysmith, and while I was gone the summons was served and judgment obtained. I told Mr. Physick I was going up country. The summons was endorsed "summons for jury," and that was the reason Mrs. Mears did not send it to me. I told Mr. Physick the notes had been stolen from me.

Cross-examined: I do not remember receiving a letter from Messrs. Physick and Welch, dated 28th September, 1866. I will not say I did not receive it. I don't know that I called on them in consequence of receiving that letter. I frequently told them I would not pay the money. It is very probable that I told Mr. Physick that I would see the company at the devil before I would pay it. I say so now. (Laughter). Arrowsmith was the holder of the bills at the time he sold them to me. I delivered value to him for them. He left the wagon where it was standing. He did not take them away. It was at the same interview. He has got the property away now. I did not see him take it away. It is not a fact that there was a dispute between us as to the sale of these notes. I told most people in Natal who were concerned in the matter. I daresay I talked to Mr. Phillips about it before the judgment. I don't know what I said to him. When I had a conversation with Wilkins about the "Wilderness" these notes were not spoken of. I have done all I could to get that judgment reversed and go on with the principal case, but I was told nothing could be done. I have not instructed Mr. Walker to go on with the principal case. I have never complied with that provisional judgment in any way. I could not do so if I would. I was told I could re-open the case by paying the money. Had I the money I should certainly have done so. I was told so by the Chief Justice on the day judgment was given. I was not told that before I was asked to sign the cession. The judgment was given after I signed the cession. The cession was signed on the 14th November, 1866; not on the 18th. The judgment was on the 6th November. After that and before the cession I had no conversation with Mr. Walker about these notes. I gave instructions about the cession before I went up the country, and signed it when I came back. About the 19th I became aware that the bond was to be seized. Mr. Clarence did not apply to me before I signed the cession. I thought it was most likely the Marine Company would seize the bond for the judgment. I cannot say that that was on my mind when I made arrangements for the purchase of the "Wilderness." I was very anxious that they should not attach the bond for the judgment. I believed they could not do so.

Mr. Walker called himself and said: I am the attorney for the plaintiff, and remember early in November last I had an interview with plaintiff and Mr. Mears with reference to the cession of the remaining portion of this bond. As far as my memory serves me that interview was at my private house. Mr. Mears then went away for some days. After his return, on the 14th, I had another interview with both of them. On the day following, this notarial cession was executed.

Mr. Goodricke objected that Mr. Walker could not give evidence as to the date of the document. It was contrary to practice that a notary could give evidence contrary to his document.

Witness: The whole of the document is in the hand-writing of my clerk save the two figures on the top of it. The 18th—the date at the top—was a Sunday. That is in my hand-writing. The way that crept in was that both the document and protocol copy were mislaid for a short time and when they were found it was seen that the 18th had been inserted instead of the 15th. After that I was called on to give notice of the cession to the Marine Company, but they would not give up the bond or endorse the cession. I went over to the Registrar of Deeds to register, but was informed it could not be done except on the original bond. I told Mr. Phillips I considered the notice quite enough to bind the Marine Company. At the top the date is the 18th, at the bottom it is the 15th. I find this one is not stamped. It ought to be, and may have fallen off. I remember that on the first occasion Mr. Phillips brought me a copy of the bond.

Cross-examined: Is it not the duty of notaries to insert in notarial deeds the correct dates, and is it not their especial care and province to do so? It is. When did you insert this date of the 18th? On the return of the documents to my office. Are you not aware, as a notary, that such an alteration vitiates the document? I know it will not. This is not an alteration at all; it is a blank filled up. Look at your protocol; has not a knife been used to alter the date? No. I think you are getting older than I am. Has not that figure been altered? No, I swear not. It is quite clear that it was a blunder to let both documents go out of the office at all, and it was not till they came back that the mistake about the dates was found out. Is not the date a very important matter in such a document? Very. Do you consider you are at liberty to alter the date? No. Why did you alter this then? I did not alter it. Look at the date at the bottom

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of the deed, has that always been the 15th? Always. Without that top to the "5" would it not have read the "6th"? I do not know what it would read; I do not understand you. Look at it and tell me if it is not so. I will lend you my spectacles? No, it is not. I see you are bilious. You say the document was executed on the 15th November, I suppose, then, the alteration was written in in the following week. The following week, you are aware, the execution was issued against the bond? I think I heard of the execution on the 16th. And it was after hearing that that you put in this date? I dare say it was; it was whenever the documents came to me. The 18th was on a Sunday, was it not? It was. Did you insert this date the day the documents were in your possession. I ought to have done so. Did you, Sir? Well, Sir, I do not know. Whenever it was done I did it in a hurry. Mr. Walker: I ask you whether it was not on the 18th that you inserted that date? Mr. Goodricke: It was not. (Laughter.) How is it you omitted to give notice of the execution of the bond till the 20th? Because it was a matter I was instructed not to divulge till ordered to do so. Therefore unless you had been told to give the notice you would never have done so? Certainly not. How was it that in the letter you wrote on the 20th you name the cession as having been made on the 13th? I probably wrote the letter without consulting the protocol. (Mr. Goodricke reads the letter). It is quite clear that when I wrote that the documents were not returned to me. Then "the 18th" was inserted over "the 15th"? Certainly not. And it was inserted on the 20th. I tell you again it was inserted after I got the documents back. I had neither the cession nor the protocol copy in my possession on the 20th; I knew they were handed to the parties interested. I cannot tell you the date when I got them back. Look at the protocol, and tell me the dates of the documents immediately preceding it. Well, the first just before it is the 16th July. What is the next previous one? You want to know whether they follow in proper order of dates. I can tell you they do not. You admit, then, that they do not follow in the proper order they purport to be dated? I do not think they do. Is not the office of a notary one of great trust and confidence? Certainly. Is he not sworn to keep his notarial documents correctly dated? Certainly. A notary is a sworn officer? Of course he is.

The Chief Justice: We are not trying Mr. Walker.

Cross-examination continued: Do you admit that the dates of the documents in the protocol do not run consecutively? Having looked at them I say now they do not run in order; it begins in the middle of the book. Give us the dates? The first is in May. Then March comes after April, then it goes from May to January and then to November. How am I to begin then? You can begin in any way you like. Are you not aware that according to the stamp act every notarial deed must be stamped? Yes, perfectly well. Why have you not stamped this cession? You will not find another deed that is not stamped in that protocol. Why, then, have you not stamped that? They are all stamped except that particular one. What stamp do you put upon them? I generally refer to the ordinance to see. Of what value should the stamp be on this? Give me a fee and I will tell you. What amount should it be?

The Chief Justice: I have been looking at the law and am in doubt whether it requires to be stamped at all.

Cross-examination continued: If there was a consideration expressed would it not be subject to a stamp?

Mr. Justice Connor: I think there ought to be a stamp on waste of time.

Mr. Goodricke: I am trying the validity of this document. If the Court thinks it is not relevant I do not wish to occupy the Court's time. I shall gain very little when I have the prejudices of the Court against me.

Mr. Justice Connor: I have been sitting here nearly half-an-hour without taking a note.

Cross-examination continued: Then there is no consideration expressed in this cession? It speaks for itself. When you got instructions to draw up the cession was there nothing said about the judgment on the bills? I will not tell you. When this cession was returned to you was there nothing said on the subject? If I remembered it I should hesitate to reply, because the conversation was confidential. How came you to apply here to know whether execution was taken out on the 15th? Because I was Mears' attorney. Was the cession executed before you applied? It was. The cession was executed in the morning when they came into town, and I ascertained that the writ was taken out before the office was closed on that day. Was it before you posted the notice that the execution of Court had been taken out? I should think it was somewhere about post time. And you applied to see if the execution was out on the 14th, I should say so. I want you to fix the hour the cession was executed? It was certainly before 12, probably between 10 and 11. You keep a day book? I do. Refer to the date when it was executed? I think it was a court day and it would not be entered. Was the 15th a court day? It was. There is an entry of attendance on Mears and Phillips the day before. Were you in Court on the 15th? I must have been. Then there is no entry of the cession being executed? Of course there would not be. Is there an entry for ascertaining whether the writ was taken out or not? I do not charge for my attendance always. You are sure it was on the morning of the 15th that the cession was made out. Had you previously ascertained whether the writ was executed? No. Have you entered writing the notice to me on the 20th? I do not know whether it is charged. No, it is not. I have not charged anything from the 14th to the 16th. Do you keep a list of your notarial documents? Yes, but my clerk cannot find it.

This closed the plaintiff's case.

Mr. Goodricke called

Mr. H. Pinson who deposed:—I remember these bills of Mears'. I received them from Mr. Raw, Mr. Fenton was with him. Raw and Wilkinson agreed to take over Fenton and Meets' affairs which I had previously transacted. Their bills ha'

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been brought to me by Fenton, Meets' partner. It was part of the arrangement that their bills bearing my endorsements were to be retired by Raw and Wilkinson as they became due, and I was to give them my bills for £240 for their bills. I did not get their bills. My bills were ultimately paid by me. The bills became my property on my giving my bills. It was a purchase. It was not a pledging. There was no arrangement that upon the payment of the £240 I was to give up the bills. No such tender was ever made to me. I know nothing of the kind ever took place, and if Fenton has said it did he has not told the truth. I handed the bills over to the Marine Company as my property. Fenton did not tell me the bills had been stolen. Mears told me they had been obtained from him improperly. That was long after I purchased them.

Cross-examined: My arrangement with the Marine Company was that they should retire all my liabilities. I am not sure whether I paid any rent to Mears.

Mr. Goodricke called himself, and stated:—On the morning of the 11th November I issued a writ of execution against Mears for the sum of £336 on a judgment obtained on a provisional sentence of this Court on the 6th. I gave the writ to the Sheriff on that day in time for the post, which closes at half-past one, giving him special instructions to see Mears and demand property, and if he returned *nulla bona* to tell him that we should seize the bond in the Marine Company's office and sell the residue in satisfaction of the debt. I told him for the purpose of seizing the bond he must send the writ to Durban, and Mr. Hoffman would give his deputy the bond. I put in the record and the writ of execution. I heard no more of it, and thought my instructions had been attended to, until the 23rd, when I got the bond, and I went on the 24th to Mr. Clarence and asked him how it was he had not followed my instructions, and I left the bond with him, telling him he was to proceed with the levy made on the 17th, and he was to advertise it. On that day or the next I got Mr. Walker's letter of the 20th, which was the first I had seen of it. I then got a letter from Mr. Clarence, telling me he had levied on the bond. I never was aware, at the time, of the Sheriff's return being made. I offered him a guarantee for his proceeding with the sale. On the 9th January I paid the Sheriff his fees, and told him that in paying them I did not withdraw the execution of the bond. I never gave any consent to withdraw. On the 24th November I wrote to Mr. Walker in reply to his letter to Mr. Physick of the 20th, telling him that my clients had obtained judgment and the bond had been attached. I never saw the cession until produced in Court.

Cross-examined: I meant to seize the bond subject to the claim of £700 and £500, commission, and interest. I have no doubt my clients would have bid for it to the amount of their judgment. I should have advised them to have done so. I cannot tell what it would have fetched. I was perfectly innocent that at the time the execution was issued the sheep had been sold. Had I known the sheep had been sold I should have issued the writ. I now remember I saw the bond at Maritzburg.

Mr. A. S. Physick stated: I am an accountant and the agent of the Marine Company. I remember the Marine Company getting a judgment against Mears on the 6th November. Previous to suing Mears two letters were written to him. He told me he had received the letter I wrote in September, 1866. He said the notes had been stolen, and he would see the company at the devil before he would pay them. I told him I knew nothing about them being stolen; the company had become possessed of them honestly and they must have payment. Within two or three days after the judgment the plaintiff called on me at the office, and asked me if I could give him any particulars as to what was due on the bond given by Pinson in favor of Mears. He said he knew there were two cessions, but he had to put the balance in part payment of the sale of the "Wilderness." He said you have got a judgment two or three days ago on two promissory notes, Mears is out of town or you would not have got the judgment, the case would have been defended. I referred to the ledger to give Mr. Phillips the information he asked for and told him that on the 30th June, 1866, the company's claim on the first cession was £585 10s. 1d., but that there were interests and commissions to be carried on till 1869 when the bond became due. I also told him there was a cession in favor of Mr. Few for £500, but that as I had not seen the papers for twelve months I was not certain whether it carried any interest, and I told him he had better apply to the head office for particulars. I told him I expected the company had the bond and would keep it for their claim. He said the company had no claim on the notes and that he should go to Mr. Walker and get his cession executed at once. He called two or three times after that, and on one occasion spoke strongly as to the course the company was taking in getting information about the notes. I replied that I was only an agent and carrying out my instructions. On one occasion he told me he considered the bond was due as the company had sold the sheep. I replied that I would not presume to argue with him, but that I considered if the company were prepared to pay the £2000 in 1869 it was no matter what became of the sheep. I saw plaintiff on the 24th November. I got a letter from Mr. Walker on the 20th and sent it down by the same post. When it came back again on the 24th Mr. Phillips said he should fight the question with the company in relation to the seizure of the bond by the Sheriff. I never gave any consent on behalf of the company for the cession of the bond to the plaintiff. The state of Mears' account in April, 1869, is that he will owe to the company £137 3s. 8d. on the cession of £700, because we have endorsed a lot of bills for him. Every half year he gets credit for £125, the hire of the sheep from him to Pinson. Mears has never paid any of the bills named in the bond. The half yearly credits have not yet paid off the bills. The Marine Company claim against both cessions at this moment, I cannot tell what amount is due without calculation. Upon Few's cession in April, 1869, there will be £783 3s. 1d. due to the company. I never saw the cession to the plaintiff.

Cross-examined: There have been no renewals

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passed by Mr. Mears. We paid the bills whilst he was in England. He left an agent here but no money. I did not know where the agent was then. The sheep were sold before the first commission was charged. Just when the second batch of bills had to be renewed. I have debited him with it. The bills were discounted by me to pay other bills of his in the banks. Nothing was deducted in the shape of commission to my knowledge. If he had paid the bills he would have owed us commission for endorsement. One was due on the 20th December, 1865, for £236 10s. That is one of the bills included in the cession dated June. In equity the cession includes that bill. The next bills were due on the 30th December, for £492 3s. 6d. They were dated the 30th June. There was another one, 6th January, for £26 17s. 6d. The whole formed a part of the cession. On the 20th November, 1866, I wrote to Mr. Hoffman and told him I had had no notice of Mr. Phillips's cession. I did not communicate with the head office before that date because they had the bond. Mr. Phillips did not come to me prior to the judgment on the notes. Of that I am quite sure. The conversation about plaintiff threatening to defeat the judgment was inside the office. I am not sure whether Mr. Skeffington was present. I am not in the habit of having my memory rubbed up by Mr. Hoffman or anybody else. I have referred to the subject in my letters to Mr. Hoffman several times. I do not recollect having a conversation with Mr. Phillips in the street. I believe he applied to me to have the cession endorsed on the bond but I had not got it. That was not the first occasion when I spoke about the judgment and the notes. I did not know but that the bond was seized. I think I told plaintiff on the morning of the 24th November that the bond had been seized. It was two or three days after the judgment that the plaintiff said he wanted the bond in payment for the "Wilderness."

Re-examined: The bills in the account were endorsed in consequence of a letter received from Mears. I think Mears went away just after the date of the cession.

Mr. J. P. Hoffman stated: I am the manager of the Marine Company in Durban. I remember this bond being seized by the deputy sheriff; he called for it at my office. That was on the 17th Nov., 1866. On the 16th I told him I had sent it up to Mr. Goodricke to hand to the Sheriff here. I had sent it on the 15th. On the 17th I got it back and handed it to the Deputy Sheriff at Durban. I received it back again from the Sheriff on the 21st Nov. He declined to attach it without a written indemnity from me. I then forwarded the bond again to Mr. Goodricke, who was in Maritzburg. I instructed Mr. Goodricke to give the Sheriff an indemnity, but I signed none. I can corroborate the evidence as to the accounts given by Mr. Physick. It would take a couple of hours to make out these accounts to show how the commission and interest is arrived at. I believe the company gave value for the bills on which they got judgment. I have had a conversation with plaintiff on these bills. He called on me in Durban and endeavoured to settle the matter. He offered to pay, in the shape of a cession on the bond, what Pinson gave Mears, and which he said was £140. He afterwards stated the amount was £240, but did not offer that. That cession was to rank third. If he gave me that I was to give him a cession of the balance. At that time nothing was said as to the date of the bond. I could not take that offer. He offered to furnish a statement of his views and his offer and give it to Mr. Goodricke who was to report, and that was done. When I came back from Capetown I heard he claimed £2000. I have never seen a copy of Mr. Phillips's cession till I came into Court. I never had any demand from him as to what was due on the bond. By the terms of the bond the £250 per annum is credited to Mears every year, although the sheep are sold. We have nothing to do with the sheep, and this credit will be called on till the due date of the bond. That gives him 12½ per cent. and the price of the sheep at the end of the time. Mears has never applied for the account. I meant to have bought the bond for the company had it been sold. I told Mr. Physick that I thought the company could afford to give £400 for it. But for this interference with the judgment it would have been in our possession.

Cross-examination continued: I don't know how much it would have fetched. I hold in my hand an account, made out by the plaintiff, of the value of the bond when the sheep were sold, but I know nothing of it. We do not admit that we were liable to the extent of £2000 for the sheep in 1866. I have frequently written to the plaintiff on the subject. I cannot answer for what Mr. Vause has written. I tried hard to keep this case out of court. I wrote to Mr. Phillips on the 5th inst. hoping that an arrangement would be come to.

Re-examined: The offer I could not endorse was £750 spreading over a year. Mr. Goodricke had authority to take £800 without prejudice, and to keep it out of Court.

Mr. Physick here produced the bills on which Mears's cession was granted.

Mr. Clarence stated: I am the Sheriff of the colony. I remember Mr. Goodricke offering the guarantee of the company, but it was not brought to me therefore I refused to do anything. That was on the 24th November. Mr. Goodricke had been previously and complained that the bond had not been advertised. Mr. Goodricke might have told me that he would give me the indemnity of the company. I should have submitted it to a solicitor. I cannot say that I would only have Mr. Goodricke's personal guarantee. I attached the bond on the 24th. I cannot find the written notice I had from Mr. Phillips. I have no letter written to my deputy on the 15th. I met Mears on the 15th and had the writ in my pocket. He said he had nothing to attach. He told me it was no use attaching the bond as it had been ceded to the plaintiff.

Mr. Walker then addressed the Court for the plaintiff. He said a great deal had been said by the other side which was irrelevant, and it having fallen from the bench that the question at issue was purely a legal one he should confine his remarks to that point. The way in which he viewed it was that a bond was in existence upon which there were special cessions, and the question was whether the charges amounted to more than his client gave

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him credit for. His client had made out an account which was based on the principle that the sale of the sheep foreclosed the bond, and that consequently the defendants were indebted to him on the face of that bond in the sum of £1116 17s. 3d. He submitted his case in the strict terms of the cession, and that would show the Court exactly what he had charged. The Court would therefore see the simplicity of the declaration, and that it was a dry matter of pounds, shillings, and pence. The plea put in combined, after endeavouring to assume that position, a piece of cowardice and impudence which he called upon the Court to say was utterly and entirely without foundation. He, of course, alluded to the gross charge against his client in his capacity of judge. His client had therefore come to the conclusion that it was no longer a question of pounds, shillings, and pence, but one in which his dignity and character was at stake, and which if true he should be no longer worthy to sit on that bench. It was sufficiently painful when the bar of the colony was charged with such acts, but he had indulged in the hope that the judges at all events would be spared attacks of that character, for if the bar was helpless surely the judges were more helpless still for they could not defend themselves. The charge against his client made in that plea was foul and dirty and one which he believed the Court would say was without a single scintilla of evidence to support it. That was the first stroke of terror which was attempted to prevent his client coming into Court. He did not believe the Court would entertain for one moment such an attempt to terrorise a judge. From the very commencement of the demand the other side had dared Mr. Phillips to go into Court; they had dared him to be a suitor in his own Court, and had said that he had abused his office and acted corruptly. The claim in reconvention was still more corruptly worded, and if it did not amount to a charge of abuse of office he did not know what did But he would pass that part of the subject by with the contempt it deserved. The great question for the Court to decide was whether the bond was foreclosed by the sale of the sheep in June, 1866, or whether it did not expire till the year 1869. He contended that when the sheep were sold the bond was foreclosed. It was a case of selling and buying, and there was no power given to the defendants to sell. He also contended that the agreement clearly contemplated that the stock should be kept up intact always; that it was competent for Mears to go in whenever he pleased, inspect the stock, see that there was no waste or that it was not made away with, and that if anything of the kind was being done that he could come to the Court and get an injunction or interdict. Even in the event of some act of God he could insist on the terms of the agreement being complied with.

Mr. Justice CONNOR: If he failed to deliver the sheep at a given time he had to pay.

Mr. WALKER thought the Court would agree with him that the bond clearly contemplated that the progeny of the flock was to be given back.

Mr. Justice CONNOR: He was to get back the flock bred by Pinson himself, therefore the flock he was to get back was to be a distinct flock from the one he let out.

Mr. WALKER believed the Court would come to the conclusion that the flock was to be used properly and that another flock equal in value was to be given back at the end of the time.

Mr. Justice CONNOR: It is quite clear that Pinson contemplated breeding from the flock lent, and at the end of the time giving Mears back a good flock.

Mr. WALKER urged that that had become a physical impossibility both by the destruction of the article and by Pinson's position.

The CHIEF JUSTICE: You say that Pinson was bound to keep up the flock and return them at the end of the time, and that the bond does not arise at all unless there is a default on the part of Pinson to restore the sheep.

Mr. WALKER argued that Pinson was bound not to waste the flock and that Mears had a power to see that he did not waste it; but he had not only done that, he had gone and deliberately destroyed his client's security altogether and now to say, after having destroyed the property to which they were the lessees that they had a right to do so, was contrary to law. It was argued on the other side that it did not signify, they could sell the sheep and make use of the money until the expiration of the time. He did not think the Court would agree with them. A more monstrous position he never heard in his life. They had not only wasted the flock away but with *malice prepense* had sold and destroyed it. They did not deny that they had failed to complete the conditions of the bond and that they had abused the post of trust confided in them, and then they turned round and said his client could not execute on the mortgage bond. In support of his argument he would call the attention of the Court to "Domat's Civil Law" p. 259, art. 466; "Chitty on Contracts," p. 643; "Pothier" vol. 1, p. 120, 122, and 127. These authorities warranted him in submitting that the hiring lapsed by the sale. They were lessees up to a certain point, but ceased to be so when the sheep were sold.

The CHIEF JUSTICE: Then you argue that the defendants having had handed over to them Pinson's estate stand in his shoes. Suppose Pinson had sold the sheep would you have called upon him immediately to give back the flock?

Mr. WALKER argued that he could have applied that the bond be excussed, and he further contended that if it could not be, a door would at once be opened for the commission of fraud. If that was not so a man could hire upon the same terms, pass a mortgage bond worth £10,000 to-day, and next year it might not be worth more than £1000; a pressure came and the value of the security had fallen, where would the bond be? It was well known that Eland's Vley was not worth now what it was when it was mortgaged, and now it was found that the defendants had availed themselves of plaintiff's sheep to put themselves in funds. Suppose the plaintiff could excuss the property and did not realise his claim, did it not look like fraud? He would suppose that the five years had lapsed, and the sheep were in existence, and it became of consequence to his client to get

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the flock back, had the defendants the option of resisting him? He thought not, and he also thought he could have got an interdict against their dealing with the sheep. The words of the bond were that failing to restore the sheep the money must be paid, but the sheep having been sold his client was clearly entitled to interest on the value of the sheep. It might be said that the sheep were sold previous to Mr. Phillips' getting an interdict on them, but he considered it was a conditional demand by Mears giving his interdict up to Mr. Phillips. It should be borne in mind that the sheep were the great security, and the defendants having, on the 26th June, 1866, put Mr. Phillips's money into their pockets he surely was entitled to that money.

Mr. Justice CONNOR: If you ask £2000 from them how can you charge them what they have received for the sheep? As far as I see there is £1000 due to them on their cession, and they have only received £424. Therefore there must be between £500 and £600 due to them.

Mr. WALKER submitted he had nothing to do with that. They get a flock of sheep which they say they take over at the price of £2000.

Mr. Justice CONNOR: Then by paying you the £2000 they are entitled to sell the sheep.

Mr. WALKER contended that then his client must have the delivery of the bond subject to what was due. In fact he wanted the £2000 subject to their charges. As to the defendant's plea on the judgment he did not know what law Mr. Goodricke was going to show which laid down that a common memorandum was not quite sufficient, but it so happened that it was a notarial bond, of the execution of which the other side had had due notice; and now they pleaded that the cession was not valid because it was not registered. Who was the cause of it not being registered? Clearly the defendants, who had refused the bond for that purpose. It was proved by the letter of the 20th November, written by himself, that they were asked, but he obtained no reply.

The CHIEF JUSTICE: It is new to me that a cession must be registered.

Mr. WALKER continued by observing that the cession was made on the 15th of November; he had, he said, explained how the dates did not agree; it was a genuine document, and yet it was argued on the other side that it could not interfere with a common, ordinary judgment against Mears. Even if the cession had been a long time after the judgment he had yet to learn that a man could not deal with his own property, and that he could not seize, sell, or transfer any part of that property. It was upon that point that the whole fabric was built. Were the defendants harmed by the change of proprietorship? He could not see how they could bring within the terms of the bond the open debt which they claimed, and which had nothing to do with Pinson. If the execution had been levied and they had got an actual attachment on the bond, a different state of things would have been before the Court to argue. But as soon as they got notice of the cession they took it out of his client's hands and abandoned the whole thing. As to the bills on which judgment was obtained, the history of the whole affair ought to have prevented the company from going into the matter at all. And again he contended that if the cession was a good one, and he held that it was, they were seizing his clients property and not that of Mears. The 24th November was the first time when action was taken by the Sheriff; with the knowledge of that fact the defendants, having possession of the bond, seize the property, and the reason given was that they had a judgment. The defendants might have been able to do a great deal whilst Mears was holder of the bond, but what they did when he gave up possession would not affect Mr. Phillips. The plaintiff had nothing to do with any agreement defendants made with Mears, and therefore he said with confidence that whatever the defendants were entitled to they could have and nothing more, and he was sure that would be the judgment of the Court. He might add, in conclusion, that he regretted the matter was not settled out of Court, and it might have been had it not been for the unfortunate plea which rendered it impossible.

The Court adjourned at 5·15. On Saturday morning,

Mr. GOODRICKE said it now became his duty to address their lordships in a case which had occupied some considerable time, and had doubtless become long and wearisome to the Court. It would be his duty to unravel the position held by the other side and to endeavour to show that they had not made out a case. Whether or not there were circumstances in the case which would come before their lordships in their position as jurymen, whatever grounds he argued he should endeavour to divest his mind of the plaintiff's position; should do his best to discharge his duty to his clients in a proper manner, and he hoped in doing so he shoul i strictly confine himself within the limits allowed to an advocate. It could not but be apparent to the Court that an advocate could not undertake a case of that kind without some amount of hesitation, and had it not been that he had for some time acted as attorney to his clients he should have avoided the position in which he found himself, and therefore he hoped the Court would bear with him in his arguments if he was not so clear and distinct as he would probably be under other circumstances He was well aware that the first duty of an advocate was to confine himself to his pleadings and to the law. He should not think of addressing the Court as jurymen, because as had already been thrown out by the bench, the question at issue was purely a matter of law and was narrowed into a very small compass indeed. Before going further into the case he would just remark that it had been asserted that it would have been settled out of Court but for himself. He wished to give a flat denial to that assertion, and assure the Court he had used every endeavour to get a settlement.

Mr. Phillips wished to confirm what Mr. Goodricke had just remarked. Mr. Goodricke not only regretted the position in which he was placed but added that if he could afford it he would pay the difference sooner than go into Court.

Mr. GOODRICKE therefore trusted the Court would exonerate him from endeavouring to throw dirt at the plaintiff.

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The CHIEF JUSTICE: Not with that plea staring us in the face.

Mr. GOODRICKE said as it had become a question of that kind he should endeavour to justify himself. There was an allegation in the declaration that the defendants had become owners of a certain farm, and that by reason of that they were chargeable with the bond. There was no allegation in the declaration that they were in any way, or by any assignment had become assignees of the flock of sheep, and that was important, because they were sued not as the agents of Henry Pinson but as the Marine Company and as the owners of the farm. There was a distinct allegation of a leasing and hiring of sheep, there was an assignment of the lease, and also an assignment of the mortgage bond as security, and the plaintiff alleged that they were not assigned to him. The entire drift of the evidence led by the plaintiff endeavoured to prove that the sheep were a special contract as also the bond, and that there was this distinction between the plaintiff and the defendant, the plaintiff had sued the defendant in one capacity namely not as agent for Pinson but as trustee of the Marine Company. It was not alleged in the declaration in any way how the Marine Company came into possession of the bond, and to another fact he wished to draw the attention of the Court, that the defendants answered the declaration in two different capacities, first as creditors of Mears, and secondly as attorneys of Pinson who executed the bond. Accordingly he shewed that Mears was indebted to the defendants in the sum of £1118 and he also shewed, by the plaintiff's replication, that the plea put up by him was never inserted, and that at no time were the defendants ever sued as Pinson. They were not sued in any way as Pinson's agents, and he contended that ought to have been done in the replication, the declaration being general. On the other hand he had answered for the defendants in two capacities, and the plea had been admitted by the plaintiff. Then, again, there was another important point in the declaration. In dealing with the account set up by the plaintiff in replication he had charged the defendants for the value of the sheep or £2000. Whom did he charge? Were Messrs. Gillespie and Acutt liable under the contract? He contended they were not so liable; they were only liable, if liable at all, upon the contract when it became due. The plaintiff was thus precluded from traversing the account unless under the general issue, and he denied that part of the defendants' plea. The deed put in, by which they sought to render the defendants liable, was a certain transfer. Now the transfer of that farm had never been made to Mears. It stood to that day in the name of Pinson and was mortgaged to the Marine Company for the amount of his liabilities. The plaintiff had scheduled in his plea the power of attorney by which the defendants became Pinson's agents, but it was not under that deed that they were liable; the Marine Company was only liable as guarantees, and the deed was expressed in those terms. They were not sued as guarantees, and he contended that before they could be so sued Pinson must be excussed, consequently he had in his plea specially challenged the plaintiff that they were the attornies of Pinson, and he should be able to show that the plaintiff stood in the position of having admitted the account or he failed altogether in claiming what he did claim. The plaintiff had sued the defendants as cessionaries of the bond on which they had advanced Mears certain sums of money. The plaintiff could only stand in the place of Mears, and he was not even clothed with the same rights as Mears since he sued as if the £700 and the £500 had been paid off. Therefore to prove that part of the account he should have sued the defendants as Pinson's agents, and having failed to do that he could not claim, under the present form of action, even although there was an amount due to him. In support of his arguments he would quote "Stevens on pleadings," p. 187, and he contended that there was no answer to the plea in any way, and he held that the rule in that case failed if the plaintiff did not traverse it.

Mr. Justice CONNOR: But the defendants have committed a wrong in determining the agreement whether they acted as Pinson's agent or not.

Mr. GOODRICKE said then he would take the bond and ask whether the defendants were not entitled to the full time to perform their stipulation, and in the next place whether the plaintiff was in a position, supposing the defendants had done a wrong, to ask them to give him a remedy for that wrong? It had been all along argued on the other side that the cession to the plaintiff was a cession of the agreement as well as a cession of the bond. That he denied, and he thought the Court would admit that the cession, if a cession at all, was only to be regarded as a cession of the bond and not of the agreement for the renting and hiring of the sheep. It was not contended that the cession drawn up by Mr. Walker was annexed to the defendant's cession, to the bond, or to the agreement, nor was the cession mentioned in the agreement, and it was that cession which had been travelled out of and intrinsic evidence brought to show that the sheep were ceded with the right to the bond. That was a question the Court would have to decide by the evidence, and he thought he should be able to prove that there was no cession of the right to the sheep. They did not both go together.

The CHIEF JUSTICE: You must bear in mind that the bond is a collateral security.

Mr. GOODRICKE submitted it was not; through the entire pleading, through the evidence and the address of the plaintiff's advocate, it had been treated as a collateral security, but it was no such thing. The bond and the agreement were in the alternative because the lessor had the right to do one thing or the other in selling the sheep, and therefore the defendants were not wrong in selling. The cession by Mears to the Marine Company was the cession of the original bond, to which was attached the agreement for the sheep, therefore the Marine Company stood in the position of being cessionaries of the lease, and although the cession was not maintained in the lease still there was this distinction between that cession and the plaintiff's cession, that the one was a separate document by itself and the other was not. He further contended that it was not a collateral security, it was an absolute bond. Pinson had his election; he

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might deal with the sheep as he liked; it was an absolute selling, letting, or hiring of the property to all intents and purposes. The Roman Dutch law was clear that a person could lend a thing that might perish with the understanding that it must be replaced by something different; the thing was in fact sold, although it might be called a letting or hiring. The alternative, therefore, was with Pinson. The holder of the bond had told the Court that he expected the £700 was to be discharged by the half-yearly payments, and that was important as showing that whatever was done with the sheep he looked to be discharged by these payments. On those grounds he contended that it was not a collateral security.

Mr. Justice CONNOR: The agreement says it is.

Mr. GOODRICKE urged that the plaintiff was not in possession of that agreement. There was not even a condition in the bond that if Pinson, supposing that it so happened that he could not deliver more than 1500 sheep of his own breeding, was to pay *pro rata*, and therefore Mears was in a position to say that he would not have 1500 sheep and £500, but that he would insist on having the £2000. He also contended that the plaintiff had no right to the agreement since it belonged to Mears by virtue of the cession. The Court should bear in mind that the sheep to be returned were to be young sheep; the same sheep were not to be delivered back; they were to be Pinson's own breeding, he being at that time considered to be a first class sheep-breeder, and therefore it was probably considered that the sheep of his breeding would be of more value than the sheep handed over. There was yet time for Pinson to breed the sheep, because they must not be more than three years old. It could not for one moment be contended the defendants were bound to deliver the sheep; he maintained that Pinson had a perfect right to deal with the sheep as he liked, provided he paid to Mears, or his representatives £250 a year; if he failed in that then the question of selling the sheep might arise, but that could not be enforced till April, 1869. It was presumed in law that when parties came to an agreement and it was reduced to writing they expressed all they meant, and any other terms could not be given by oral testimony; an act of writing was a deliberate act by which the parties were to be bound. Now they had a great deal of oral evidence on the part of the plaintiff as to what was the meaning of his cession, whereas Mear's cession ceded all his right, title, and interest for the £700, and he could not part with any portion of it until that debt was liquidated. Then there was Few's cession, and subsequently the plaintiff tried to come in for the remaining interest whereas no remaining interest could be valued until the time had expired. Consequently he maintained that Mears had no business to part with it. As for Mr. Walker's argument it was annexed to what was called a cession, but he contended that there was no cession of any agreement for the sheep, because there was none attached to it. There was not a word in Mr. Walker's cession to the effect that the original bond was given to the notary. It said that due consideration had been received, but if so how could Mears, in the face of such a declaration, cede that bond to the plaintiff? He did not cede the lease. What was the value? There was none expressed, and he believed authorities would bear him out when he said that for a bond of that description there should be a consideration expressed. It was alleged that the value received was the "Wilderness," but that was only gathered from oral evidence, there was no transfer of that property, and no declaration that it had been sold to Wilkins who considered himself as acting for the plaintiff. The bond did not mention a syllable about the contract or the interest to be payable half yearly. There was no good and valid consideration given for the cession simply because none could be given by Mears, and because the sale of the "Wilderness" was between Wilkins and Mears and not between Mr. Phillips and Mears. The plaintiff had tried to file the declarations but the Registrar of Deeds refused unless the transfer duty was paid on the "Wilderness," first from Mr. Phillips to Wilkins, and then from Wilkins to Mears; it was therefore not a legal sale, and further than that he would not remark.

Mr. Justice CONNOR: Can you contend that because the transfer duties were not paid the sale is void? It is done over and over again.

The CHIEF JUSTICE: The property is in Mr. Phillips's name still.

Mr. GOODRICKE added that it had been since mortgaged by him, but he contended it still belonged to Wilkins his creditors having abandoned it.

The CHIEF JUSTICE: You must bear in mind that to a certain extent Mr. Phillips is the trustee of Mears.

Mr. GOODRICKE thought not. The plaintiff claimed the whole bond; if he was entitled to anything it became a serious question as to whether the money was really due to the extent he claimed, and the defendants were affected to that extent. If the defendants were entitled to the judgment against Mears and he got anything in exchange the defendants were prevented from obtaining the amount of their judgment by execution because the property was locked up. And therefore the defendants were damaged by the cession to the plaintiff. Being the parties under the obligation he again contended that they had a right to make their election, and in support of that he would quote "Chitty on Contracts" p. 943. Mr. Walker's authority would have been strong had there been no collateral security given by Pinson. He again urged that Pinson agreed that if he did not give Mears the sheep on a certain day he would pay him £2000, and he gave an absolute bond to cover the amount, but if he did deliver the sheep he was absolved from the bond. That bond, he contended, was an alternative and not a collateral security; Lord Denman was very strong on that point, and his words were "So if the time for performing the contract arrives the promiser expressly renounces the contract, the promisee may treat this as a breach of such contract, and may at once maintain an action in respect thereof. But when the promisee has this option, he is bound to exercise it, and he cannot seek to hold the promiser to the prospective performance of his contract, and, at the same time,

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say that it has been renounced. But it is said, that, if an act is to be performed at a future specified time the contract is not broken by the doing of something which may merely prevent the performance thereof in the meantime. "Lovelock *vs.* Franklyn," 8, Q B, 378. He would also quote "Domat," art. 1, sect. 647; "Addi-on on Contracts," p. 1038, who said, "If a party engages to do two things, the one is cumulative upon the other, and he must perform both the things agreed to be done, but if the contract is in the alternative for the performance of one or the other of two different acts the liability is discharged by the performance of one of the acts." Now he contended that this was an alternative contract, and the defendants had made their election to pay the money when it became due. With regard to the cession itself he would leave the Court to draw its own conclusions as to the alteration of the date. They could take Mr. Walker's evidence in no other light than that he had tampered with it, but he would simply draw the attention of the Court to his cross-examination on that point. It was a question whether or not there was any evidence that would give the cession any credit as a notarial document. If it was a properly accredited notarial document it was entitled to full faith and credence, but it was wanting in the due formalities in which the Court placed their dependence. There was not that quality nor amount of evidence that entitled the Court to say that it was a good and valid document, and their Lordships would have to consider the question. The Court should also remember what was being done by the defendants at that period, and also that the notary was watching the proceedings. He considered it singular that the notice given by the plaintiff to the Sheriff had not been produced. The defendants too had not been asked to produce the bond but to register a cession as made on the 13th November, the reason of which was because it was known that on the 15th the execution was issued and the writ handed to the Sheriff in time for him to go to Mears, who made a return of *nulla bona*, and then, acting under instructions, to send the writ to Durban for the purpose of seizing the bond. These circumstances should all be taken into consideration in testing the validity of the cession. It was a serious question as to the date of the cession. If executed on the 18th the bond was in the hands of the Sheriff under seizure. He did not want to be considered as throwing dirt at the plaintiff, but there were unpleasant facts which he felt bound to submit to their Lordships. With regard to the judgment against Mears on the 6th November, according to the rules and practice of the Court the defendant was bound to give security and then the principal action would have been proceeded with. If Mears, however, had no money, and the present plaintiff came here to fight the case, he must say he was very sorry indeed it was a position that the plaintiff could not assume, as he only sued as cessionary of the bond and not as attorney or agent for Mears. The judgment of the Court in the Free State was nothing to them, as it was shown that the defendants had given valid and sufficient consideration for the bills; that must be clear to their Lordships. The Court must not consider that the mere offer of payment of money constituted a tender, and it must not be forgotton that the party offering to buy or pay for the notes was insolvent at the time. Pinson had paid £240. Even supposing the plaintiff did hold the fourth cession, as they read it the bond was due in 1869, but the plaintiff said he would have the bond, the whole bond, and nothing but the bond, as the defendants had paid themselves. He had offered defendants to allow them a cession for £140, but they said they were entitled to a cession for £336. Was there that satisfactory evidence which the Court were bound to look for to prove that the cession had been executed on the 15th November? Surely Mr. Hoffman's evidence would not be thrown aside which showed that there had been a seizure of the bond on the 17th Nov. It was a question as to whether the Sheriff should do it on security, as he was bound to seize property that was given him. On the 15th Nov. the writ was issued and payment demanded, when a return of *nulla bona* was made. The bond was then seized and was in the hands of the Sheriff between the 17th and 23rd of November, and yet nothing was done with it. On the 24th November he had asked him why he had not advertised the property, and he replied that he wanted a guarantee. He was at a loss to say why the Sheriff did not seize, and it raised a considerable suspicion in his mind with regard to the acts of the Sheriff. Why should the Sheriff have written him on the 24th and say he had seized the bond? Why did he not do so on the 17th? And why was not that a good seizure? The Sheriff had demanded security and he had offered the guarantee of the company but he requested his (Mr. G.'s) individual security. The Sheriff was bound to advertise the moment a seizure was made and it was time enough to ask for security after the advertisement was issued, and before the sale; he certainly had no right to refuse the security of the company.

Mr. Justice CONNOR observed that Mr. Goodricke had had some experience in the matter of advertising a seizure of goods too soon.

The CHIEF JUSTICE: You remember the case of Tarboton.

Mr. GOODRICKE: I think the case a most unjust one, and many of the public think so too.

The CHIEF JUSTICE: A jury did not think so.

Mr. GOODRICKE: The first jury returned a verdict that there were no damages.

Mr: WALKER: And the whole public were then indignant.

Mr. GOODRICKE continued to address the Court, calling attention to the straightforward manner in which Mr. Physick had given his evidence, and although attempted to be shaken did not contradict himself in the least. Mr. P. had stated that plaintiff had called at the office after the judgment and said that he was present when judgment was given in Mears's case, and intended to have a cession of the bond. That evidence was not shaken. Therefore, taking all the circumstances with regard to the cession into consideration, the fact of the judgment obtained by the Company on the 6th November, the fact of the plaintiff going to Mr. Physick and having that conversation and saying that the Company should not have

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the bond as satisfaction for that judgment, the difficult circumstances as to the date of execution and the fact of the doubt that existed as to the insertion of the date, which the Chief Justice said had been inserted in an Irish way——

The CHIEF JUSTICE: I did not say that.

Mr. GOODRICKE observed that there was the fact that the documents coming before and after this document were not of concurrent dates. As to the question of dates he submitted to the Court as to whether or not, sitting as jurymen they, would consider the document good and valid.

The CHIEF JUSTICE: What I said was that the protocol was like an Irish protocol as it had two beginnings.

Mr. GOODRICKE argued that the date of the cession could not be fixed by the Court, and it could not be determined whether it was executed before the seizure of the bond or not. The Court could not say that it was not made after the 24th November. The attesting witnesses to the cession should have been called. The plaintiff having sat and heard the case must have been aware of the agreement between Pinson and Mears. Another question to be decided in this trial was the commission, and interest to be allowed to the Company. By the terms of the cession the Company were entitled to renewals of amounts that might be due after payment of rents. They had been unable to shew renewals, because so placed that they could not obtain renewals as Mears was absent from the colony, but surely he was not to take advantage of his own wrong. If Mears had been in the colony the Company would have obtained renewals. The position of the Company was well known, and that heavy and considerable calls were to be made to meet the liabilities of the Company. They were entitled to 15 per cent. for payments, and the commission on renewals was the only thing they really got.

Mr. Justice CONNOR said that the Company could not get interest and commission both. The interest was for money actually paid, and commission for monies not paid and accruing by reason of the endorsement of Mears' notes by the Company.

Mr. GOODRICKE said that the Company had been compelled to borrow the money they lent Mears at 15 per cent., and the commission accruing under the agreement was the only thing they would get. It was contemplated that after the payment of £125 for the rent of the sheep every six months fresh bills should be drawn for the amount, and they should receive commission on those bills which would carry 15 per cent. interest. It was a question whether by the Roman Dutch law sufficient possession had been given for the consideration. Possession in Roman Dutch law meant transfer. In conclusion he must urge that on the 6th November they obtained judgment against Mears, and on the 8th plaintiff went to Mr. Physick saying they would not attach the bond as he would obtain a cession. It was alleged that on the 10th the purchase was completed, and on the 20th notice of the cession was sent to Durban, but that notice said that the cession had been made on the 13th. It had been shown in opposition to the statement made in plaintiff's declaration that the case had been delayed until Mears was out of the colony, that on the 26th September he had been written to and told that he would be sued. Summons had been issued and served at Mears' residence on the 3rd November, and there was evidence that he was in town at the time. The writ had been issued on the 15th, and there could be no doubt that a seizure of the bond to all intents and purposes, had been made on the 17th instant. It remained in the Sheriff's possession for several days, and on the 24th he found that the Sheriff had not attached or advertised it. A great deal had been said about the special plea that plaintiff had obstructed the defendants. Whether they were right or not was for the Court to say, but there was sufficient evidence to prove they were right in recording such a plea. It was a serious plea. It would have been much better for the plaintiff, occupying the position he did, when he found that there was an obstruction and obstacle in the carrying out of the contract to have said, "I am not going to litigate this case for you." He was quite sure His Lordship (the Chief Justice) would not have done it, but would have said "I am not going to bring myself into an action in this way." He (Mr. G.) would also have done the same thing, he would never have taken anything in payment that was likely to be litigated; the plaintiff had put himself in the position of Mears for the purpose of litigating the right and title of the Marine Insurance & Trust Company. It was not for him to say anything ungentlemanly with regard to the plaintiff, but he did say that he had assumed a position in which he ought not to have placed himself. Any man with common sense would not have allowed himself to be drawn into a lawsuit, and would have said unless the purchase was completed in some other way it must go for nothing.

The CHIEF JUSTICE: Suppose Mr. Mears had brought an action.

Mr. GOODRICKE did not think he would have done it.

Mr. WALKER said that he had threatened to do so.

Mr. GOODRICKE thought he had argued the case fairly, and conducted it with gentlemanly feeling throughout. He had not desired to throw dirt at the plaintiff, but he must say that there were even in the cession circumstances which justified the position which the company had taken.

Mr. Justice CONNOR: Have you a right to say because a man is a judge that he is not to sue for his rights?

The CHIEF JUSTICE: In other words that a judge is bound because he is a coward to stand still and be robbed of his property.

Mr. GOODRICKE thought it meant that the plaintiff should have said he would not take payment in any property that brought him into litigation. When the plaintiff had gone to the office, Mr. Physick did not tell him what was still due on the bond, he had only said that there were certain charges on it as well as others, for the particulars of which he must apply to the Durban office. He trusted his remarks would have consideration with the Court, and that the law he quoted would have due consideration also paid to it. He had other authorities which he did not consider it worth while to trouble the Court with. He, however, did not really think the plaintiff was entitled to what he asked for, viz., £970. The Court could not find that the cession was good and valid, and another question was, even if the cession was good, whether the bond was due until April, 1869. There could be no question that the company

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were at least entitled to £240 on the bills. Every effort had been made to settle the case during its progress.

The CHIEF JUSTICE: After that plea it was impossible to bring it to an amicable settlement.

Mr. GOODRICKE said that the directors of the company consider that they had been unduly interfered with. There were circumstances connected with that execution, and with the seizure of the bond and execution of the cession, that would fairly arouse suspicion in the mind of any man. He could not, however, help expressing his feeling that throughout this case he had had up-hill work.

The CHIEF JUSTICE: What do you mean by up-hill work?

Mr. GOODRICKE said he only meant that an attorney could gather an opinion as to the feeling of the bench in a case. He did not mean to say that the Court might not be fair and reasonable, but it had been his duty to urge the law as the authorities appeared to support his view of the case.

The CHIEF JUSTICE, in giving judgment, observed that the case had occupied the best of two days, but he did not think the circumstances connected with the case were very many, and certainly not difficult. The circumstances disclosed in the evidence were simply these: The plaintiff at one time had sold the "Wilderness" to Wilkins, who, after the purchase, became insolvent, and the creditors, through the trustee, repudiated the sale, and it therefore reverted to Mr. Phillips. The property remained in possession of plaintiff for some time until on one occasion, when the plaintiff was absent, Wilkins first seemed to have contemplated the sale of the property for plaintiff to a certain Mr. Fraser, but something broke off those negotiations. After that, however, Wilkins had sold the "Wilderness," as agent of plaintiff, to Mears for £1,850, but subsequently the amount was reduced to £1,800. On plaintiff's return he saw Mears and ratified the transaction as arranged, and the question then appeared to have been as to how Mears was to pay plaintiff, when it was ultimately settled that the payment should be as follows:—Mears had a thousand sheep with Besta, and two thousand with Pinson; and as regards Pinson's sheep he had a mortgage bond stipulating that, if these sheep were not duly forthcoming at the expiration of the lease, Pinson should pay £2,000 for the sheep. As regards Besta's sheep plaintiff received 700 of them, and promissory notes and valuable consideration for the balance. It was then settled that plaintiff was to get a cession of the bond then in the possession of defendants—and about which possession His Lordship would speak presently—as part payment of the purchase price. The plaintiff then went to defendants' office, and, according to his account, saw Mr. Physick, the manager, and had some conversation with him, which resulted, as plaintiff stated, in satisfying his mind as to the worth of the balance of the bond, after paying off prior charges in favor of the Marine Insurance and Trust Company and Few. Plaintiff then ratified the bargain of sale, the agreement further being that whatever the plaintiff recovered of the property in payment of the "Wilderness" over and above the purchase price was to be paid over by plaintiff as trustee to Mears. With reference to this part of the case it had been urged by Mr. Goodricke that in respect of the first sale to Wilkins the plaintiff obtained the purchase price in the shape of a house, which was valued at £900; but admitting that to be so, if the plaintiff had not received some part of the purchase price, in all probability he would have brought an action for damages by reason of the creditors of Wilkins having repudiated the sale of the "Wilderness;" but the plaintiff did not do so, and had a perfect right to retain the property, which the other party had failed to complete the bargain of. It appeared in evidence that in October Mears and plaintiff instructed Mr. Walker, who seemed to have held their mutual power of attorney, to draw a cession or transfer of the bond to plaintiff, but the matter was delayed and put off. Mears was away for one reason, and it was delayed until November 15th, on which day the cession appeared to have been made. Of course everyone would see that there was some blundering as to dates, and his Lordship saw no reason for saying that the addition of the 18th was done *mala fide* or improperly. He considered it one of those errors that often occurred when parties were in a hurry. It was, however, strange that in the letter there was another error. In the note the cession was said to have been signed on the 13th, and in the notarial cession it was written as the 15th and 18th. Mr. Goodricke had rung the changes on that sufficiently. There was certainly some degree of blundering as to date, but the plaintiff was not responsible for that. It appeared then that on the 6th November, at a time when it was apparent that Mears was away from home, the defendants in this case, who knew that Mears had a defence to the notes in question, whilst he was away, caused a summons to be left at his house, and being marked "juryman" his wife did not take any notice of it, so that on the 6th November provisional judgment was obtained on the two promissory notes, about which His Lordship would speak presently. The cession of the bond to the present plaintiff was signed on the 15th although the bargain was made and instructions were given in October. On the 6th November the judgment was obtained, and on the 15th November the writ was issued against the property of Mears for the amount of the provisional judgment. It was strange that the cession and issuing of writ should have occurred on the same day. It also appeared that on Mears' return he made an application to the Court with a view to the stay of execution, and they had referred to the affidavit upon which the application then made had been founded. The application was unsuccessful, and from that time to the present no steps had been taken by defendants to obtain a final judgment or proceed with the principal case for the recovery of those notes. It was true that Mears, if he had the means, and he said he had not, could, by paying the money and obtaining security *de restituendo*, have forced the defendants herein to proceed with the principal case. But of course they would not proceed as they knew the circumstances connected with these notes. It appeared from the evidence that three promissory notes had been signed by Mears in favor of Hermann, who lived in the

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Orange Free State. These notes represented a large sum of money. Mears, being about to leave that part of the country, and giving notice that he was on the point of departure from the Free State, requested all claims against him to be sent in, and among those preferred was that made by the holder of these three notes. Mears therefore compromised the notes, as they had a long time to run, and as he was about to leave, with Arrowsmith, the name of the party holding the notes, and who afterwards took them away from Mears' desk without his knowledge, although they had been paid. Mears had then given notice of the loss of these notes, and warned all persons not to negotiate them as they had been abstracted from him. One of the notes found its way into the Free State, and was impounded in the courts there, and Arrowsmith was allowed three months to obtain possession for the purpose of restoring the notes to plaintiff. But according to Fenton's evidence the two notes found their way to this country and were first in the possession of Raw and Wilkinson. Fenton at that time represented the firm of Fenton and Meets, who then carried on business in the Free State It being necessary to obtain money, and Raw and Wilkinson being unable to obtain it, Fenton obtained the bills, as he said he knew how to raise the wind, and went to Pinson, who seemed to have been a stanch friend of his in those days, and, according to Fenton, did not sell but pledged them for £240. He gave them to Pinson with the agreement that he was to advance £240 on the notes which represented £336, the notes to be lodged and remain with Pinson until the money was re-paid; that is, that on the payment of that sum of £240 he (Fenton) was entitled to redeem them. According to Pinson, however, that was not the case; but he had bought the notes out and out for £240, as although they represented £336 they had a long time to run, and there would be some risk in recovering the sum. After this transaction and Pinson became possessed of those notes, he assigned his estate to the defendants in this case. Under this arrangement Pinson was to cede his property to the present defendants, on the condition that they paid his debts as by schedule enumerated. In consequence of the above transaction the notes of Mears to Hermann found their way into the possession of defendants in this case, and it appeared that the defendants on two separate occasions, as representing Pinson, applied to Mears in writing to pay the notes, and threatened him that if they were not paid they should institute proceedings for their recovery. The notice appeared to have been given as far back as August, but proceedings were not taken until November 3rd, and unfortunately at a time when Mears was away from town. The defendants having obtained the judgment proceeded to issue a writ of execution on the 15th November. Judgment had been obtained on the 6th inst., and they had thus lain by until the 15th. In issuing the writ they had set about obtaining an attachment in a most novel manner, and in one which his Lordship had never seen carried out before. Mr. Goodricke said he had instructed the Sheriff to go to Mears and ask him to pay the writ, and if he did not pay the amount or point out sufficient property to satisfy the writ, then he (Mr. G.) would give him the bond to seize. This bond was Pinson's, and in the possession of plaintiffs in that case. The Sheriff was also to tell Mears that if the writ was not paid the bond would be seized. The plaintiff in this case heard that the bond was to be seized and went to the Sheriff and gave him notice that it was his (plaintiff's) bond, and told the Sheriff that he would hold him responsible if it was sold. The Sheriff had consequently demanded to be indemnified by the plaintiffs in that case, but the indemnity was not forthcoming. Mr. Goodricke had said that he had offered the indemnity of the Marine Insurance and Trust Company, but the Sheriff would not take it. Subsequently the bond left the possession of the Sheriff and got back into the hands of the defendants, where it had remained until the present time for ought his Lordship knew to the contrary. In addition to what the plaintiff had told the Sheriff, he seemed to have told Mr. Physick that he was present when a judgment was obtained in the Supreme Court against Mears, and that he should get a cession of the bond completed at once. That was simply all which had called forth from defendants in this case, the plea that the plaintiff was a judge of the Supreme Court, and insinuating that in abuse of that position he was the means of preventing the defendants from getting their just rights. His Lordship thought he had mentioned the whole of the circumstances which had called forth from the defendants the plea which he had referred to. Talk about settlement and amicable arrangement, that was a plea after the filing of which, or even notice that it would be filed, it was impossible for the plaintiff to do otherwise than have the case properly investigated. The fact of Mr. Goodricke telling the plaintiff that if he did not settle the matter he should put such a plea on record, was nothing more than a threat—a lever to drive the plaintiff to do what he was not bound to do. Together with the notes of Mears already spoken of when the cession and assignment of Pinson's estate took place, the two thousand sheep that Pinson had from Mears passed with the rest of the property into the possession of defendants, and it might be, as it had been suggested, that the sheep were even sold before the cession in favor of plaintiff, but it was not shown that that knowledge was within the plaintiff's breast at the time the cession took place. It appeared clearly in evidence, in fact it was admitted by Mr. Goodricke for the defendants, that they proposed to sell the sheep, no doubt to save expense and further loss by death The sheep were accordingly sold, and he was not prepared to say what they realised, as he had not added up the figures, but it was something between £700 and £800. According to law, which he was bound to administer, the very moment that Pinson or his representative sold the sheep, he broke the contract, and rendered the bond due and payable. That was his Lordship's view, because the sheep were to be kept up. It was no part of the agreement, either implied or direct, that Pinson or his representative should sell these sheep and put the money in his pocket, and then make Mears wait for his money. Suppose that Pinson had, the day after the sheep were

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delivered to him, sold them, and put the money in his pocket, would Mears have had to wait five years for his money? That could not be, it was an utter absurdity. The facts were very few, and it appeared to him that the case was a simple one, as the very moment that Pinson or his representative broke the agreement by selling the sheep, and devoting the proceeds to other purposes, that moment the contract was broken and the bond became due. His Lordship, therefore, thought that there must be judgment for the plaintiff.

Mr. Justice CONNOR also thought there must be judgment for plaintiff. The Chief Justice had stated the facts of the case so fully and clearly that His Lordship would only state those necessary to the proper understanding of the grounds on which he went. He would refer to the agreement between Pinson and Mesrs. Mears owned certain sheep and Pinson wanted to hire some, so that on the 22nd September, 1864, an arrangmeent was entered into by which Pinson was to have two thousand sheep from Mears; in fact, Mears let that number of sheep to Pinson at 2s. 6d. per head per annum, and they were to be restored at the end of five years. At the end of the five years a flock of two thousand sheep of Pinson's breeding were to be delivered up, or, failing the delivery, a sum of £2000 be paid. The first thing for consideration was that there was to be a lease of two thousand sheep at a rental 2s. 6d. per head per annum, and at the end of the five years Mears was to receive back again 2000 sheep, but during the whole time or period of the lease there was always to be, or as nearly as possible, a flock of 2000 sheep, out of which to realise the rent. According to the terms of a lease and the property out of which rent came the property must continue and remain, for who could get oats from a stack of forage after it was burnt? It was idle to suppose that such a construction could be put upon the agreement as was argued by Mr. Goodricke, viz., that the next day after receiving the sheep Pinson could have sold them and put the money in his pocket, and told Mears he could do nothing whilst the £250 per annum rent was paid. If such a construction could be put upon the law it would be most melancholy, but the law could not be construed so ridiculously. It was a lease of a flock of sheep, and he would not say that the sheep to be returned were to be bred out of that flock, but Pinson was to use his best endeavours to keep up a flock of two thousand sheep, out of which the rent was to be paid, and at the end of the time yield up to Mears that number of sheep, or the sum of £2000. That was the right construction of the agreement. Pinson's affairs were assigned to the defendants, and the company had taken upon themselves to sell all the sheep and destroy the property out of which the rent was to come, and so terminated the lease. What was the bond? It was to secure the payment of the rent, and binding the lessee to pay £2000 if the sheep were not handed over at the end of the time. But by the destruction of the lease it was put an end to, and by making away with the sheep and destroying the lease the bond became due, and as the sheep were not handed over the money must be paid. That was the fair legal construction of the law, and it would be a mockery to say that Pinson could sell the sheep the day after the agreement was signed. Upon the sale of the sheep, therefore, the lease being terminated, the money became due. It was after the sale of the sheep that the "Wilderness," after being sold by plaintiff to Wilkins, returned back to him, and then, out of kindness to Wilkins, plaintiff had said that if Wilkins could sell for more than the original contract he might have the balance. Wilkins consequently looked out for a purchaser, and first found Fraser, but that arrangement fell through, and he then found a purchaser in Mears, at a sum of £1800. The arrangement being that he would satisfy Mr. Phillips as to payment when he came to town. This was in the month of October, and Mr. Phillips had returned to town before November term, when Mears had shown plaintiff how he could satisfy him as to the payment. Mears said that he had two thousand sheep with Pinson and one thousand with Besta, that he would cede Pinson's bond after deducting two prior charges of £700 and £500 respectively. Mr. Phillips said this happened within the first three days of November, but there was some doubt as to the date. When a man, however, was dealing about one particular question of importance to himself, he was much more likely to remember it than a clerk in a public company's office who did not unless he made entries of each particular transaction receive the same impression that a person interested would. There was a conflict as to dates, but Mr. Phillips thought it was the 3rd November, he was sure it was not later, as Mears was in a hurry to go to Ladismith that he went up to Mr. Physick to ascertain the value of the bond. Mr. Physick denied it, but Mr. Phillips remembered it. Just fancy, if such was the case, that the plaintiff had gone to the office and enquired about the bond, and they had said they had a claim on certain notes, would not that be a suggestion to begin to sue Mears at once, and the summons was issued on the 3rd November, the very day on which Mr. Phillips said he had enquired about the bond. Mears had sworn that when the summons was taken out he had gone away, and that tallied with the account of Mr. Phillips, that Mears was on the point of going to Ladismith when he saw him. Then, although the summons was served on the 3rd November, after Mears had left, it was consistent with the fact that notice had been given Mr. Physick that morning that plaintiff was about to get a cession of the bond. There was another fact also, Mears went to Ladismith, and came back when he heard that judgment had been obtained on the notes. He then flew to the Court to have his remedy, and made an affidavit on the point, which was sworn on the 13th November. The issuing of the summons on the 3rd November, and the swearing of the affidavit on the 13th, corroborated the dates. It appeared that after Mears returned almost immediately the cession was duly signed in favor of defendant, about the 15th November, according to the duplicate copies. The date at the end of the document written at the time of the signature must be the correct one of the two. It was not for him to say whether the date affected the notarial cession, for a notarial cession was not neces-

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sary. Mr. Walker had sworn to the signatures, and there was ample proof that the parties to the cession did sign. His Lordship had no doubt that the cession was completed on the 15th Nov., which would then get rid of the seizure, because that only took place on the 17th Nov. Much had been said as to whether the cession carried with it the sheep in question. The sheep had then been sold and the lease put an end to, the bond being due for £2000. The bond was therefore due, and the cession carried the interest in the bond, to Mr. Phillips, the plaintiff. There was also the plea, to which he should refer. Now the plea had noticed in a most unnecessary way the fact that Mr. Phillips was a judge of the Court, and implied in some way, although it was impossible to say in what way, that he had used his office of judge to secure his personal interest. Now, what evidence was there of that? There was no evidence to show that he had used his influence with the Sheriff or Registrar. The only charge was that by sitting as judge in Court he heard that Mears was liable to the company for some £300 or £400. The plea was simply an insinuation that he had used his office to carry out his own personal interest. Having become acquainted, as any one else might have done, that Mears was liable for a certain sum he hastened to complete the contract. Mr. Physick had made use of a curious expression; he admitted that on the 8th November he had been informed by Mr. Phillips that he should do his best to get a cession of the bond, and he was asked why he did not communicate with the head office, and he replied that he only communicated what was done and not what was about to be done. That was Mr. Physick's account why he did not communicate to his principal this threat of plaintiff's, and only communicated the information on the 20th November. In all this there was not the slightest ground for raising a charge against a judge, which charge might have been raised against any one not a judge. Any one might have known there was judgment against a particular man as well as the judge, and although such a plea had been placed on the records of the Court, there was not a syllable that might not have been equally true about any person not a judge. It sounded very much like personal malignity, or an attempt to force a composition, or to intimidate a person from coming into Court. It might be induced by a mixture of all these, and it was the absolute duty of this Court to mark in some way its reprobation of such a course; when personal malice or deliberate intention at intimidation was shewn in this Court they felt it their duty to visit it in a proper manner. This conduct was worse in its essence when directed against a judge. How could any question be more important than the administration of justice? It was true that judges should be independent, and not have to feel conscious that if they ventured to assert their rights that they were to be met by libellous records against them; that endeavours would be made to intimidate them, whether right or wrong, in the public courts of the country, and a man calculating upon another man's dislike of having all his motives made the observations of everyone was to dread to come into Court to defend his rights for fear of being intimidated and maligned. This would apply to the meanest individual in the country, and the crime was not lessened that the attempt was made in this case to interfere with the independence of justice, to intimidate a person holding the office of a judge—the duties of which office he must discharge free from terror. It was certainly difficult to understand the madness of putting such a plea on record. Personal malignity hardly accounted for it, nor even intimidation for the madness that induced it, without even a particle of evidence of any act by plaintiff, which any individual in the country, and least connected with the Court, could not have learnt. His Lordship felt he was bound to make these observations, because it was a base thing, and a thing which the Court always set its face against, to make the records of the Court a slander. It also increased the depth of the crime when it was considered that the public were concerned, that through the individual the due administration of the justice of the country was assaulted. With this view of the case, that the lease was put an end to by the sale of the sheep, and the bond became due, the question was how much the defendants had a right to claim. He must observe that the defendants, by their own act, had terminated the bond before its time, and by the termination of the bond they became liable to pay the sum of £2,000, with the exception of a certain sum advanced on promissory notes bearing the endorsement of the company, and an amount payable to Few. The defendants also could not charge interest and commission. It hardly sounded real to hear how the Company intended to live upon this bond. They were going to charge 5 per cent. on endorsements. Then the bond was to last 5 years, and there were to be imaginary renewals of these notes every six months, upon which 5 per cent. was to be paid, and it was to last for 5 years, and in that way only about £135 would remain for the Company to pay at the end of the 5 years, when the bond should be due. All men concerned in an art were said to take a pleasure in the exercise of that art, and his Lordship had no doubt that it had been a sincere pleasure to calculate these interests. It sounded like the pleasure arising from the music of the future. But there was something better than that, they not only calculated the receipts, but then they said they would have to pay something, and they had the notes for £336, on which they obtained a judgment while Mears was away. They would seize the bond and sell it subject to the charges. No one would bid for it, and they would buy their future liability. Thus they would not only have this music for 5 years, but also buy in the bond. All this was urged with all the clearness and skill of Mr. Goodricke in argument who stated that the parties felt themselves grievously injured, although by their own wrongful act they had become liable as far back as June, 1866, to pay the bond. This was the bond that they wished to have had the right to sell under attachment, and buy in themselves for a mere song. Could anyone have any doubt that by the sale of the sheep they became liable to pay the bond? They decided to sell the bond in the way said, but would there have been any diffi-

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culty in obtaining an interdict? No doubt the plaintiff was entitled to payment of his claim and on the sale of the sheep the company became liable for the £2000. Whatever they did, no interest could be claimed from the date of the sale of the sheep, as they had paid themselves the whole amount of Mears' notes between £600 and £700. They were therefore entitled to 5 per cent. commission, and interest at 15 per cent. on that sum up to the date of the sale of the sheep, and against that amount was to be credited £250 per annum, the annual rent of the sheep. That would then leave the company something less than £600 under that payment. The company were also entitled to Few's £500 and interest at 15 per cent., but all the interest would stop at the date the sheep were sold. It appeared that the plaintiff was not entitled to more than £1800, and had received 700 sheep and £200 or £300 in respect of the purchase price in promissory notes. It had been contended that plaintiff repaid Mears any surplus sum exceeding £1800 that he should receive, but it was a question whether the defendants were bound to pay the plaintiff any sum of money more than, with what he had received from Besta, would make up £1800, and how far they might not retain the balance on account of the judgment against Mears. He should therefore decree judgment for plaintiff, and in order to convey the strong feeling the Court had, and felt bound to have, in respect of the charge on the records of the Court there would be full costs. Judgment would be therefore for plaintiff in convention and reconvention, with full costs, that was as regarded plaintiff there should be no costs between attorney and client.

The judgment of the Court, therefore, was that the amount of Mears' promissory notes connected with the endorsement of the company for about £700 be credited defendants with one 5 per cent. commission, and with interest upon the amount of the notes at 15 per cent. to June 26, 1866. Defendants to be debited with £250 rent per annum up to the same date from commencement of lease. The interest only to be reckoned on the balance due from time to time. Defendants to be credited with Few's £500, with interest at 15 per cent. from date of cession also to June 26th, 1866. Plaintiff to be entitled to balance between these sums and £2000, with interest at 12½ per cent. from June 26, 1866, but plaintiff not entitled to receive of this sum any more than reckoned with what he has already received in respect of the sale to Mears will make up the £1800. If the parties cannot agree as to the sum due, that it be referred to the Master for report, with liberty to parties interested to apply as to the surplus, if any. Defendants interdicted from parting with, or otherwise alienating, the bond until further order. Full costs awarded plaintiff as against defendants.

Mr. Goodricke calling attention to Mr. Justice Connor's supposition that the summons on Mears' notes for £336 had been prepared after Mr. Phillips had called at the office of the Marine Insurance Company, said that the summons had been prepared in Durban, and only sent up here for the purpose of issuing.

Mr. Justice Connor thought the fact of the summons being issued on the 3rd November, the same day on which Mr. Phillips had called, was a singular coincidence.

## (BEFORE A FULL BENCH.)

JOSEPH KING *vs.* J. T. NEL.

Mr. Justice Phillips took his seat on the bench.

In this case Mr Walker appeared for the plaintiff, and Mr. Shepstone for defendant.

This was a case in which under the new rule the summons stood for the declaration. The defendant was summoned to shew cause why he should not pay plaintiff the sum of £16 10s. as and for the value of a horse lost about twelve months before action commenced and kept by defendant, and for £10 damages, as the defendant persisted in retaining the horse. The plea was first general denial and also that the horse was sold to Major Erskine in April, 1865, for shipment to India, and that the horse did not return to defendant for a long time but remained on a farm at Weenen, the said horse having been finally rejected by Major Erskine. That the said horse was wrongfully sold by D. Torpy, although no one had a right to sell or dispose of said horse. It appeared that the horse was now dead.

The evidence adduced by the plaintiff and defendant proved that the party from whom the plaintiff had purchased had released the horse in dispute from the pound, and it evidently did not belong to him. The defendant identified the horse as his own, and stated that it had been reared on his farm. Under these circumstances the Court gave judgment for defendant with costs.

## MONDAY, JULY 29, 1867.

H. B. LIVERSAGE *vs.* B. H. KEMMER.

Mr. Walker appeared for the plaintiff, and Mr. Shepstone for the defendant. The defendant was summoned to show cause why he should not pay plaintiff £120 as and for damages sustained by reason of trespass and injury done to his property. The declaration averred that plaintiff was proprietor of 3,251 acres, 2 roods, 28 perches, being subdivision D of the farm "Nooitgedacht," and that defendant owned land adjoining his property, and on the pretence that his land so adjoined his (plaintiff's) land, had destroyed valuable wood to the value of £120, in 1866. The defendant pleaded general denial.

The Court recommended, seeing that the plaintiff was the registered owner of the land in the question, that parties should compromise the damage.

After a short consultation the parties came to terms, and a judgment was recorded, by consent, in favor of the plaintiff for £60 damages and costs. The amount of the judgment to be paid in two equal instalments at three and six months.

The Court then rose.

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## TUESDAY, JULY 30, 1867.

### MASTER'S REPORTS.

The MASTER reported that in the matter of William Deane *vs.* Joseph Fraser, three pieces of land had been sold under execution, when George St. Paul purchased for £420. The Court confirmed the sale, and authorised the transfer of the property free from existing bonds.

That in the matter of Hamilton Ross *vs.* William Palmer and George Johnstone, the Court had authorised the sale of a piece of land of about 928 acres attached under execution; that a portion of the above farm "Umhloti" had been sold by consent of the first mortgagee, leaving a balance of 729 acres, 3 roods, and 13 perches. He therefore prayed that he might be authorised to sell the remaining portion instead of the whole. The Court authorised the Master to sell, as prayed.

That in the matter of John Scott *vs.* William Watson the report of the sale of the property had been confirmed as sold to the plaintiff, but such was not the case, as the Natal Bank themselves had purchased. The Court allowed the previous order to be amended accordingly.

In the estate of George Roach, deceased, in pursuance of an order of the first puisne judge, the Master had to report whether it would be for the benefit of the minor heirs, to confirm a sale of a portion of the farm "Umhlateen" to J. D. Nicholson, for £320. The Master considered the price a fair one, and that the sale would be for the benefit of the minor children. The report was filed so that the parties interested could move.

### JOHN POSNOTT *vs.* CHAS. FREEMAN.

Mr. WALKER again applied in this matter for the civil imprisonment of defendant, and read the various documents and affidavit charging E. Campbell, the cessionee of the claim, with collusion with defendant. Mr. Walker stated that his taxed costs were £28 1s., and those between attorney and client £15, of which sum he had only received about £4. He had never authorised Posnott to deal with the claim. He had been to see Campbell, who refused to say anything to him, stating that he was not in Court. He had consequently summoned both Campbell and Freeman to give evidence. He quoted Archbold's Practice, pp 118, 19, Peterdorff's Common Law, and other authorities, to prove that a client could not go behind the attorney and settle a claim or interfere with the attorney's claim for costs. Also that an attorney had a lien on a judgment for costs between attorney and client, and payment should therefore go through his hands.

Mr. BUCHANAN, who appeared for Freeman, had no affidavits in reply to Mr Walker's assertion that there was collusion between Campbell and Freeman.

The CHIEF JUSTICE would, in a case where there was opposition of this kind, give costs. The Court would have no sympathy for the man who tried to cheat the attorney in that way.

The COURT granted the decree of civil imprisonment for Mr. Walker's costs, £28, and the costs of this application, but to be suspended until the first day of next term.

### *In re* A. MACNICHOL'S ESTATE.

In this matter Mr. Cope appeared for the trustee in the above estate and prayed the Court to cancel a certain deed of transfer in favor of insolvent's son, and authorise the transfer to the trustee, or otherwise that as trustee he should have power to sell the property on behalf of the estate. It appeared that £517 of the debts due by insolvent were incurred in the building of a hotel on two pieces of land standing in the name of the insolvent's son, and that shortly since, on a report of the Master that it would be for the benefit of the minor to mortgage the property, the Court authorised its being mortgaged for £250, but this had not been made use of, as the insolvent had been unable to obtain the money.

Mr. SHEPSTONE applied, as his client Mr. Macnichol was very ill, that the matter should stand over till the first day of next term, and he thought that some arrangement might perhaps be made in the meantime.

Mr. COPE consenting the matter stood over till the first day of next term.

### ESTATE MARITZBURG AUCTION COMPANY.

Mr SHEPSTONE applied for an order on Messrs. Francis and Fraser compelling them to give up all the papers and documents to the trustees, Messrs. Physick, Welch, and Button.

As Mr. Walker, who appeared for the respondents, had no affidavit in reply, and said they were acting under a deed of assignment, and only wanted an order of Court, the matter was postponed until the next day to allow him to produce the deed of assignment and an answering affidavit.

### ESTATE H. MULLER.

Mr. BUCHANAN appeared for the insolvent and applied for his rehabilitation, and put in and read the necessary affidavit, certificate of Master, examination before the Master on the balance sheet, and letter of the trustee. The deficiency by the balance sheet was £6.800.

Mr. Muller stated that his losses £1,193 had arisen from the death of cattle, and bad debts £1,900 from endorsements. He had lent his name and was so let in. He had lost about £1000 by Maré, and about £700 on Botha's bills in favor of Craig. He had given up his blacksmith's business to go trading. He had received no consideration for endorsing Maré and Botha's bill. Wagons and cattle were handed over to the trustee. His agent, Mr. John Craig, had surrendered his estate while he was out of the colony.

The COURT granted the usual order.

### *In re* ESTATE W. H. ABLETT, JUN.

Mr. COPE appeared on behalf of Mrs. L. Struthers, a bondholder in the above estate for £250, to ask the Court to grant an order compelling the trustees, the Natal Fire Assurance and Trust Company, to file the liquidation and distribution account immediately.

Mr. BUCHANAN appeared for the trustees, and stated that an account had been filed, but in consequence of a party requiring to prove a claim it had to be withdrawn. The trustees were prepared to pay applicant's claim immediately the account was confirmed

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The COURT ordered the account to be filed forthwith, but awarded no costs to Mr. Cope, as they considered his client's conduct had been remiss.

*In re* PINSON *vs.* FEW.

Mr. BUCHANAN applied for an extension of the interdict, which expired that day.

The COURT extended it until Tuesday next, Mr. Buchanan to give notice to Mr. Few of any future application for its extension.

*In re* NATAL FIRE ASSURANCE AND TRUST COMPANY.

Mr. BUCHANAN, in the matter of the winding-up of the above Company, appeared to show cause on behalf of Dr. Aldridge and Capt. Jos. Nourse why the calls should not be levied. The petition averred that the Company was one of limited liability, and that the shares were fully paid up.

Mr. WALKER appeared in the same matter on behalf of Mr. A. J. de Kock.

Mr. Justice CONNOR thought that if parties from any reason considered themselves not liable to pay they could refuse to do so when called upon.

Mr. WALKER would show that, although the law made shareholders liable for two years' previous to the winding-up, still his client was neither a contributory nor shareholder at the present time. Mr. W. would like to know who was to be excussed first, his client, or the party to whom he had sold in November, 1865.

Mr. Justice PHILLIPS said the law made them both liable if the contract did not. Every man on the list must pay, and those on the second list would be repaid if those on the first list paid enough.

The CHIEF JUSTICE referred to the 27th section of the Winding-up Act of 1866.

Mr. WALKER could not see why they should come on his client first. The actual shareholder was first to be asked, and if there was a deficiency then he could understand their coming upon the other parties.

Mr. Justice CONNOR observed that a shareholder was not liable for debts incurred since the transfer of his shares.

Mr. WALKER observed that if the present shareholder and all parties holding the same shares during a period of two years were compelled to pay £10 each, in some cases £30 and even more would be paid upon some of the shares.

Mr. BUCHANAN said the question was whether, where parties were perfectly innocent, could they be compelled to do something not strictly legal, and it became a question whether they were not entitled to that investigation which the law gave them. The questions raised in this matter required much deliberation, and time should be allowed for the parties to communicate with England and the shareholders there.

The CHIEF JUSTICE would be unwilling to postpone the payment of the call after the 1st Sept. It would be time for shareholders to refuse to pay the call then and contest the question.

Mr. Justice CONNOR observed that both shareholders were liable in the amount of each share; thus if a share hnd passed through 20 persons' hands during the two years the call would be payable by 20 persons in proportion.

Mr. SHEPSTONE argued that each shareholder must pay the whole amount.

Mr. Richards, as a contributory, asked to be allowed to make a few remarks. He thought that the Winding-up Act had no retrospective effect, in fact no law could be made to have a retrospective effect, but all law was made *in futuro*, except where expressly stated. When the law was made and passed he was entirely unconnected with the company. When the company had got into difficulties Mr. Cato had asked him to become a director, as there was great difficulty in obtaining disinterested persons as directors, and with that intention and believing that he could retire at any time, he had accepted the appointment of director, being only nominally qualified. He had done a deal of work for the company, and claimed under those circumstances to be exempt.

Mr. Justice PHILLIPS said that was good as regarded shareholders, but not as regarded creditors.

Mr. BUCHANAN said he also appeared for Mr. Meek, who claimed to be exempt on the same grounds as Mr. de Kock.

Mr. Justice PHILLIPS said that if calls were not paid on the 1st September, the official liquidator would come and ask for an order directing the parties to pay, and they would make their defence. If time was wanted to make a defence the Court would not hurry them.

Mr. Justice CONNOR trusted the law would not make parties liable who were not liable.

Mr. Justice PHILLIPS said the law could not extend the liability of a shareholder beyond what it was when the law was passed.

The CHIEF JUSTICE would not bind himself either way.

Mr. Justice CONNOR would strive in every way to oppose such a monstrous construction of the law.

The Court refused to make any order.

*In re* COLONIAL BANK.

Mr. WALKER applied for the confirmation of the order authorising a call of £2 per share on the contributories of the above company.

Mr. SHEPSTONE stated that the London and South African Bank were down in the list as contributories, and they only held shares which were deposited by Mr. E. Buchanan, and registered in his name.

Mr. BUCHANAN stated that the Natal Bank were down in the list in the same manner for 100 shares, which were only deposited with them.

Mr. Justice PHILLIPS said that they must give the official manager notice that he must strike out their names, and he would then consult with his attorney, and if according to his advice would strike them out.

The Court, in this matter also, refused to make any order.

*In re* W. H. ABLETT, JUN'S., ESTATE.

Mr. BUCHANAN, on behalf of the trustees in the above estate, applied for leave to transfer certain property in which a question has arisen as to whether sugar machinery goes with the freehold or not.

The Court refused to make any order as the application was made.

The Court then rose about 3 p.m.

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## WEDNESDAY, JULY 31, 1867.

BISHOP OF NATAL *vs.* REV. J. H. WILLS.

Our readers will remember that this case was argued before the full Court on Monday the first and Tuesday the second days of July, 1867. Mr. S. Pinsent appeared for the applicant and the rev. respondent conducted his own case. During the May term a rule *nisi* was granted by the Court, Mr. Justice Connor dissenting, compelling the respondent to show cause why he should not be prevented preaching or officiating as a Church of England minister in any buildings set apart for the uses of the Church of England and Ireland in this colony, until he should have obtained the license of the Bishop so to do. The following was the judgment of the Court:—

The CHIEF JUSTICE read the following judgment:—In giving judgment on the question in conflict between these parties, it will be necessary in the first instance to state shortly the proceedings before the Court, in order that it may be seen in how far the law to which I will refer is applicable. In May last the applicant presented a petition to the Court, verified by affidavit, stating: 1. That he is the legal and only Bishop of the Church of England in this colony; 2. That by the laws of that Church no clergyman can officiate or preach without the license of the Bishop of the diocese; 3. That the respondent holds no such license, but nevertheless preaches and officiates without a license; 4. That in April the applicant caused a notice to be served, forbidding the respondent from officiating, either in the Cathedral or St. Andrew's Churches, or in any building set apart for the use of the Church of England, until licensed; and 5. That the respondent, in defiance of such notice, persisted in preaching. This petition concludes with a prayer for an interdict against the respondent continuing to officiate, or for such other order as to the Court may seem fit. When this petition was brought to the notice of the Court by the applicant's counsel, verified as it is, the Court granted what is technically called a *rule nisi*, calling upon the respondent by an order of the Court to show cause on the 1st day of this term why such an interdict as the applicant sought should not be granted. The Court in granting this rule were not unanimous; one of the Court contended that the applicant should be left to his action, and that the process of interdict was not the remedy the applicant should adopt, unless he either had instituted his action (*rauw actie*) or was about to do so. From this view the majority of the Court dissented, and I still think properly dissented. The questions which have recently agitated the English Church in this colony have given rise to a great deal of discussion on a variety of subjects, and amongst them, the question of the granting of interdicts. It is important in dealing with that question to bear in mind that the Supreme Court in this colony possesses and exercises all the powers, authority, and jurisdiction which in England is exercised by the various Courts of Chancery, the common Law Courts, the Divorce Court, and indeed by every Superior Court in England. There is an appeal to our Supreme Court from all the inferior Courts in the colony, and the only power that can interfere in the way of appeal with the decisions of this Court is the Queen in Council. The Supreme Court here possesses all the jurisdiction and power which the Supreme Court in Holland possessed, and its foundation or constitution is based upon the system and the law adopted and modified in Holland from the civil law, and commonly called the Roman Dutch Law. It is to this law, then, that this Court must look for a solution of this, or indeed any other question. No man has a higher respect or is willing to pay greater deference to the wisdom and the justice of the laws of England, or to the vast talent of the eminent men both on the bench and at the bar, who have from time to time and now do administer those laws, than I have. I should indeed be delighted if the disputes now existing here—the disputes, in fact, between two great parties distinguished into high church, and low church, and the important question of the supremacy of the Queen as regards the Colonial Anglican Church—could have been dealt with by men in England far, very far, my superiors in every possible respect. Their position and their learning would have carried a weight with their decision which mine cannot possess. On the other hand, I am forced to pronounce a decision between these litigants, since they have chosen the *forum*, of which I am a member, to decide between them. If my decision should be held to be right, I shall be sufficiently recompensed for the trouble and serious consideration I have bestowed. If it be held wrong, which is perfectly possible, and even likely, I shall, of course, bow with respect, and content myself with the feeling that although wrong it was what my conscience dictated as the right step. The process of interdict is well known in the practice of the Roman Dutch Law, and to the Courts which like this Court are founded on that system, and I shall show that it is also practised in the English Courts. It has been stated during these proceedings that the interdict must be preceded, or be accompanied by an *action*. I think this position is too broadly stated. It no doubt generally is so; but it is not necessarily so in all cases. I shall refer to books, the authenticity of which have never been questioned, as regards the practice of the Supreme Court of Holland, under the Roman Dutch Law. Van der Linden, in his *Judicial Practice*, book 11, cap. 19, p. 288, § 3 (this is not that work of Van der Linden's which is translated into English), lays down, "It is certain that interdicts generally operate *in futurum* to stop the progress of any mischief, and therefore *ad non faciendum*; whilst the reparation of mischief already done is generally the occasion of a supplemental *rauw actie*. But there are instances that for apparent reasons of necessity an interdict may be granted whereby anyone may be constrained *ad factum*." The section then proceeds, and instances the case that a father may obtain an interdict against any person detaining his child, the effect of which would be, he says, that the child would be immediately returned to its father. Merula Mannier van procederen, let. 4, tit 2, cap. 24, lays down that to obtain an interdict "A petition is presented to the Court containing a short statement of the facts on which the petition is founded."

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"Interdicts," he says, "are now generally granted after hearing the parties by appointing a hearing, &c." Further in note (*a*), Merula says, "In tit 4, cap. 1, § 1, it is laid down that commonly the *rauw* action must accompany the interdict, and that there cannot be a single interdict, but this is erroneous, and many interdicts may be granted without the *rauw* action." And he proceeds to state many examples, such as an interdict against the execution of a sentence, and the like. I will here ask whether the steps taken by the applicant, viz.: the petition,—the hearing of the parties,—are not in the strictest sense in accordance with the authority cited in Merula, and whether it is not clear also from that authority, as well as from Van der Linden, that the *rauw* action is not absolutely necessary? Let us now see how the English Law stands on this part of the subject. I have found a case in the 2 Jurist (N.S.) p. 336, that very much resembles some of the proceedings in this controversy,—it is the case of the Attorney General *v.* St. Cross Hospital *exparte* Holloway, before the Court of Appeal in Chancery, on which occasion the Court seems to have been assisted by Lord Chief Justice Earle, and another judge, not belonging to the Court of Chancery. The question arose under the following circumstances: In August, 1853, a decree was made by the Master of the Rolls, on the information of the Attorney General, for regulating the future administration of the Hospital of St. Cross, under which a receiver was appointed. In May, 1854, Mr. Holloway, who insisted that the chapel of the hospital was the parish church of the Parish of St. Faith, of which he was churchwarden, went into the chapel of the hospital when the clergman who was officiating in the absence of the chaplain was about to commence the service, proceeded to the communion table, removed the cloth, inspected the elements, and then replaced the cloth. He next demanded to see the cleryman's license from the bishop. The Master of the Rolls made the following order: "That the Rev. Henry Holloway be restrained from interrupting or interfering with the performance of Divine Service in the chapel, &c, and from himself performing or attempting to perform Divine Service in the said chapel, and from in any manner interfering with the said chapel or the furniture thereof, until the court shall make other order to the contrary; but the said Henry Holloway is to be at liberty to take any proceedings in any Court he may be advised to try the question raised by him." After this, Mr. Holloway applied to have the injunction removed, but he would not be heard. He now appealed to the Court of Appeal in Chancery, by petition, and the result was that his petition was dismissed. This case shows that the *rauw* action, as the Roman Dutch Law terms it, but which is nothing else than what in English practice would be termed the action in the case, was forced, not upon the party obtaining the interdict, but the reverse, and it also shows that, whilst Mr. Holloway was no party to the original proceedings, he was interdicted and left to seek his remedy as best he could. So much, then, for the theory which has been contended for, that interdicts without an accompanying action in the case are not competent. I think I have shown that the position exists in theory only, and is unfounded in law and in practice. In the case before us, the applicant seeks for an interdict to operate as, Van der Linden says, *in futurum*. He seeks no damages. He wants none for what has already occurred, and therefore the *rauw actie* does not arise. Before quitting this part of the subject, I may mention that cases are to be found in the records of the court, in which interdicts have been confirmed or made perpetual without any proceeding in the shape of the *rauw actie*, or the action in the case, precisely as was done in the English law to which I have referred. Something has been said on this, as on a former occasion, that this Court has no jurisdiction in such matters as this. I presume it is meant no ecclesiastical jurisdiction. The Privy Council have decided that the Anglican Church here is no State Church as it is in England. It stands on the same footing as the Dutch Reformed Church, or any other religious body in the colony—it is in fact, a voluntary association. Now when the jurisdiction of the court is objected to, the wide difference this decision creates in the position of the Colonial English Church, and the National Church in England, must not be forgotten. Indeed the Privy Council in the case of the applicant, lays down "It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no *established* Church." But it is unnecessary to put forth any lengthened argument on this subject, since I am prepared to show that the court has full jurisdiction. Surely this court has as much jurisdiction within the colony, of course, as the Master of the Rolls has in England. And again, it has the same jurisdiction as the Supreme Court at the Cape, who tried the case of the Bishop of Cape Town and Mr. Long. I have in addition to this several authorities which bear directly on the point. I shall quote one, Van der Linden, in his judicial practice, 1 Book, 1 Cap. § 3, where, speaking of the different courts in Holland, he says, "There are certain cases subject to a separate judication. These are Church matters, namely, when the teaching or morals of clergymen, or visitors of the sick, or a member, is called in question or requires censure. In these cases the office of the civil judge does not arise, unless the want of executive power in the Church court requires that the continuance of any impropriety should be stopped. These, then, are instances in which the courts of justice have granted interdicts or made other provision in Church matters." He then goes on to say, "The government are not in the habit of interfering, unless the Church disputes begin to rise to such a height that they may disturb the public peace." This last quotation has no immediate bearing upon my argument, but, remembering the scenes which have within the last two years disturbed our community in reference to Church affairs, the authority is not altogether irrelevant. I am of opinion that, by the decision of the Privy Council, in the case of Long and the Bishop of Cape Town, and the Bishop of Cape Town and the Bishop of Natal, it is perfectly clear: 1. That, after the establishment of an independent legislature in Natal and the Cape, there was no power in the Crown to establish a metro-

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politan see or province, or to create an ecclesiastical corporation whose status, rights, and authority the colony could be required to acknowledge. 2. That, therefore, there is not at the present time any metropolitan see, or bishop, to whom the Bishop of the colony is subject. 3. That the deposition or deprivation of the applicant by the Bishop of Cape Town, in the exercise of pretended metropolitan powers, is, in the words of the Privy Council, "null and void in law." 4. That therefore the applicant is as much the Bishop of Natal under his letters patent to-day as he was before the deprivation pretended to be exercised by the Bishop of Cape Town, with this exception only, namely, that he is not subject to the Bishop of Cape Town as his metropolitan, and, 5. That the Bishop of Cape Town cannot, as regards the diocese of Natal, exercise any metropolitan jurisdiction, or appoint any persons to represent him in the exercise of any such metropolitan jurisdiction in Natal, any more than he could do in respect of the diocese of Calcutta, or any other separate and distinct bishopric. In the course of the argument on this question, the respondent has denied the *consecration* of the applicant as Bishop of Natal, as well as that he is Bishop of Natal. I hardly anticipated that such an objection would have been had recourse to; but the denial fails at the very starting point, for if he was not consecrated, how could he have been deposed or deprived by the Bishop of Cape Town as the head of the party with whom the respondent says "he works?" That the applicant was duly consecrated there can be no doubt, any more than that the Bishop of Cape Town was consecrated. It cannot be denied that the applicant holds the Queen's letters patent appointing him Bishop of Natal, nor can it be denied that these letters patent remain up to the present time unrevoked. The Privy Council have decided that these letters patent confer no coercive power or jurisdiction, but they have not decided that the appointment of the applicant under them is null and void in law, or in other words that there is no Bishop of Natal, and no Bishop of Capetown. This Court has, however, held in the case of the Bishop of Natal *vs.* the Bishop of Capetown, that the Bishop of Natal is the trustee of the cathedral in the room of the Bishop of Capetown; how then can the Court now say that the applicant has no status—no position recognized by law? In my opinion, so long as the applicant holds these letters patent unrevoked, he is to all intents and purposes the Bishop of the Anglican Church in Natal, and in possession of all the powers and privileges appertaining to that position, except those which the Privy Council have declared the Sovereign had no power to confer. If the applicant has misbehaved, if he has done any act, or put forward any theological opinion which renders him unfit or incapable of retaining this position, why is he not deprived? Why are his letters patent not cancelled? The same power that created him can unmake him. I have observed two or three occasions on which issue might have been fairly joined with the applicant on this question, and it seemed to me that those who are in opposition to the applicant most studiously avoided raising this vital question. The recent case before the Master of the Rolls afforded an admirable opportunity for pleading that the applicant, by his teaching or writing, had rendered himself an unfit or an improper person to hold the office he does, yet the case turned altogether on different grounds. Even in the case of the cathedral before this Court issue might have been taken on this point, but in both instances this was avoided. I have no doubt that the respondent and his party have good reason for this course, but in the meantime the applicant is entitled to any privileges which under his letters patent are fairly due to him, except, of course, as modified by the Privy Council. I do not mean to refer to the very able judgment given by Lord Romilly, and which has been much relied on in the argument of this question I entertain the deepest respect for the dicta he has laid down, but he has not touched except inferentially, upon the question I have to consider. The Privy Council, in Mr. Long's case, lay down that the members of the Colonial Anglican Church may "adopt, as the members of any other communion might adopt, rules for enforcing discipline within their body, which would be binding on those who expressly or by implication had assented to them;" and further on in the judgment in that case it is stated: "It might be further laid down that where any religious or other lawful association had not only agreed in the terms of its union, but had also constituted a tribunal to determine whether the rules of the association had been violated by any of its members or not, and what should be the consequence of such violation, then the decision of such tribunal would be binding, provided it acted within the scope of its authority, observed such forms as the rules required if any forms be presented, and if not, proceeded in a manner consonant with the principles of justice. In such cases the tribunals so constituted were not in any sense courts; they derived no authority from the Crown; they had no power of their own to enforce their sentence, they must apply for that purpose to the courts established by law, and such courts would give effect to their decisions as they gave effect to the decisions of arbitrators whose jurisdiction rested entirely upon the agreement of the parties." Now the question at once rises to the surface, viz.: Have the members of the English Church in the colony of Natal adopted any rules for enforcing discipline within their body? In answer to this question I have no doubt whatever that in so far as local circumstances would allow, the members of the English Church have, in some instances directly, and in others by implication, adopted the rules in force in England in reference to the English Church. It is shown by the letters put in that in one instance the applicant through the Dean of Pietermaritzburg refused to license a gentleman to preach in the cathedral, and in another that he refused to license another gentleman. That some license is necessary by the rules adopted by this communion is admitted by the respondent himself, for he told us he was licensed by the Vicar General appointed by the Bishop of Cape Town. I have already shown that the Bishop of Cape Town is not the Metropolitan; he has no power himself to grant a license, nor can he substitute another to exercise a power or a function he

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does not possess, or which does not belong to him. It is also clear to my mind that the rules I have referred to, denuded of the power of a Metropolitan, require that a clergyman cannot preach or officiate in the churches of this diocese without the license of the applicant, as the legally constituted Bishop of this diocese. It would be inconsistent with good rule, order, and discipline, if this were not so, and would, moreover, be inconsistent with the decision of this Court to which I have already alluded, by which it was decided that the applicant stepped into the shoes of the Bishop of Cape Town when Natal ceased to belong to the see of Cape Town.

Mr. Justice CONNOR read the following judgment: This case has come before the Court upon an application by petition for a perpetual interdict against the respondent's officiating in the Cathedral Church of St. Peter, in Pietermaritzburg, or in any other of the churches or buildings in Natal set apart for the uses of the United Church of England and Ireland without the license of the applicant. When the case was first before the Court I gave several reasons why I thought it was out of the question that a perpetual interdict should be granted without an action. I may therefore dispose of that point now very summarily. To grant such an interdict, equivalent, I need hardly say, to a final judgment, without an action appears to me to be *ultra vires curiæ*, as being against our practice; against our express decision in 1860 in the case of the *Municipality* vs. *Ryder*; against the law creating this Court, No. 10, 1857, which provides for the pending of a cause in Court only by the issuing of a summons in an action; against also the Jury Ordinance of this colony, No. 7, 1852, as the course pursued here avoids a jury; against our law of evidence No. 17, 1859, assimilating our law to that of England, as this procedure avoids the *viva voce* examination and cross-examination of witnesses; against the principle so vital, and prevailing, I may say, in all superior courts, that causes of action and grounds of defence are to be recorded in pleadings, whose forms and several steps are regulated by known legal principles, and by rules of Court; against finally Roman Dutch Law, (Voet 43, 1, 1, and 9 Brissonius *De verborum significatione ad verbum Interdictum*. Van der Linden's *Institutes*, 439-444.) The arguments in support of the form of application adopted here, were, I may say, all *ab inconvenienti*, or of the *solvuntur risu tabulæ* class. It was said, suppose, on my going home, I found a stranger in my house; or suppose a layman getting into the pulpit of a Church; or a person abstracting stone from another's quarry; or a stranger taking the Chief Justice's seat on the bench; and it was asked, was the result of an action to be abided in all these cases before the nuisance could be abated? I ask, are you to wait until the intruder shows cause under a previously obtained rule *nisi*, why he is not to be perpetually interdicted from continuing his intrusion? The Sheriff we know would dispose of the intruder on the bench, the police of the others. All these instances, too, are cases of the disturbance of possession, and Roman Dutch Law expressly gives a summary process for restoring possession which has been taken away *clam, aut vi, aut precario*. The remedy is known as the *mandament van complainte*, or *van spolie*, or the interdict *unde vi*, and is based on the maxim *spoliatus ante omnia est restituendus*, *Van der Linden*, 184-186. But independently of all this, if the intruder had any claim of right, he ought not to be perpetually interdicted from asserting it without the usual proceedings and judgment in an action. Whether such a summary process might or might not be conveniently established, I am not discussing, but if established it ought to be regulated by rules of Court, and I greatly doubt that this Court has the power to frame such rules, as they would subvert courses of procedure and principles of the constitution and law, either expressly or impliedly recognised and supported by the law by which this Court is created. I shall conclude these condensed observations by an extract from the Privy Council judgment, delivered recently by Lord Chelmsford in the *Queen* vs. *Hughes*, 1 *Law Rep.*, Ap. P.C. 81, where it was decided that the course of procedure, known in England as that by *scire facias*, could not be resorted to in Australia to quash a crown grant. The judgment having stated (91) that it was contended "that if persons injured by these grants were debarred from this mode of proceeding they would be remediless," continues, "To this it was correctly answered that the question of the power of a court to proceed in a particular course of administering justice was one of substance and not merely of form." And that however convenient and necessary a mode of proceeding for the redress of certain wrongs might be, that consideration alone would not confer jurisdiction on the court to sanction its introduction." As, however, it has become requisite to consider this application upon the merits, independently of the question of the form of procedure, I proceed now to deal with that part of the case. The petition here bases the claim to an interdict exclusively upon the applicant's rights as a Bishop with royal letters patent for Natal. No question of contract or of trusteeship is involved in this case; the claim appears to me to be in substance this: "I am in law, by the law of this colony, entitled to all the rights, privileges, and jurisdictions, save the physical execution of sentences, that a diocesan Bishop of the Church of England in England is there entitled to, and therefore claim jurisdiction to inhibit any clergyman from officiating without my license in any building set apart howsoever, and vested in whomsoever for the purposes of the united Church of England and Ireland in Natal. I have inhibited the respondent, he disregards my inhibition, and I therefore, by the law and in the law's name, call upon this Court to aid my inhibition so that I shall be able to send the respondent to prison if he continues to disregard my authority." This sounds startling after the recent cases decided beyond appeal, upon the inefficacy of Episcopal letters patent in a colony like Natal. I have, so recently in a judgment delivered in this Court (*Bishop of Natal* vs. *Bishop of Capetown*, Jan. 31, 1867), in a case in which the trusteeship of the cathedral or church of St. Peter in this town, was in question, examined at great length three decisions in England relating to this subject, *The*

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*Queen* vs. *Eton College* (27 *Law Journal Reports*, *Q B.* 132), *Long* vs. *the Bishop of Capetown* (*I. Moore's Privy Council Repor's*, *N.S.*, 411), and *In the matter of the Bishop of Natal*, (3 *Moore's Privy Council*, *N S.*, 115), that to do so again to almost any extent would be but to repeat myself, —to repeat the quotations, the remarks, and the arguments which I then included in my judgment. This I am unwilling to do, and I must, therefore, as relates to quotations, remarks, and arguments of the kind in any detail, refer to my judgment in the case which I have mentioned. In the same judgment I explained, also at considerable length, in what respects it appeared to me that a great part of the Master of the Rolls' judgment in Colenso *vs.* Gladstone (36 *Law Journal Reports*, *Chan* 2) was in conflict with the three decisions which I have above referred to, but especially with the two in the Privy Council. From this ungracious task I therefore consider myself relieved upon the present occasion, referring to my previous judgment for that purpose. The claim in this case appears to me to be a claim of jurisdiction of a very large kind; I understood it to be avowed at the bar, and I think rightly so, that the claim in principle went to prevent any person, by any device, having the services of a clergyman in any building, though the persons own property, set apart for worship according to the forms of the United Church of England and Ireland in Natal, or according to the forms of the English Church, which name, it was contended, meant the same as the other, unless that clergyman obtained and retained the applicant's episcopal license. I regard this, as I have said, as a claim of considerable jurisdiction over both clergy and laity; and by what right? By right of letters patent, which (for there is no distinction for this purpose beween them and the letters patent decided on), according to the decision of the Privy Council in *Long* vs. *the Bishop of Capetown*, p. 460, "were ineffectual to create any jurisdiction, ecclesiastical or civil, within the colony," and in *In the matter of the Bishop of Natal*, "were insufficient to create an ecclesiastical corporation whose status, rights, and authority the colony could be required to recognise," or "to assign him any diocese or give him any sphere of action," or "to have any such effect or operation" as that "a bishopric may be constituted and ecclesiastical jurisdiction conferred" thereby, the Privy Council stating that they adhered to the principles to that effect laid down in the case of *Long* vs *the Bishop of Capetown*; ineffectual, the Privy Council resumes, "to confer any jurisdiction or coercive legal authority" over any person: that the clauses purporting to create an "ecclesiastical tribunal or jurisdiction" "are simply void in law," that a bishop thereunder has "no jurisdiction by law" "no jurisdiction or legal authority." Such is the reply to my question, By what right was this large jurisdiction claimed here. I now ask by whom is it claimed? I shall answer in the words of the Privy Council in the same case, "The United Church of England and Ireland is not a part of the constitution in any colonial settlement nor can its authorities or those who bear office in it claim to be recognised by the law of the colony otherwise than as the members of a voluntary association." "Members," who I apprehend are in the eye of the law all on a par, and that therefore the applicant has no more right in law to claim jurisdiction over the respondent, than the respondent has to claim jurisdiction over him. For the development of these principles, and their complete accordance not only with the words of the judgments containing them but also with the basis upon which these judgments rest, and with the analogy of their arrangement, and of their principle progressing from case to case, I refer, as I have said, to the detail into which I entered in my recent judgment. I may however mention here as I did not there, that the principle that the Crown by proclaiming its intention of summoning a legislative assembly in a colony under, I presume, a Royal Charter incapacitates itself from legislation there, was laid down as long ago as in Chief Justice Lord Mansfield's time by him in the case of *Campbell* vs. *Hall* (*Cowper* 204 *Lofft* 655). This case was referred to by the Privy Council in *Jephson* v. *Riera* (3 *Knapp* 130,152) where it is said that Lord Mansfield declared "the letters patent void solely on the ground that the King had before the date of those letters patent, by his proclamation and charter, precluded himself from the exercise of a legislative authority over the island of Grenada." The same case, *Campbell* vs. *Hall*, is again referred to by the Privy Council in *Cameron* vs. *Kyte* (3 *Knapp* 332.341) as an authority for the conclusion that the King has "the whole legislative authority in a conquered colony in so far as he may not have parted with it by capitulation or by his own voluntary grant." There was a point connected with this part of the case, suggested during the argument as a difficulty, which it is so clear to me, is, if rightly understood, of no difficulty that it may be well here to refer to it. It was said: If the letters patent of 1847 giving Natal a legislature were effectual for that purpose, why should not the applicant's letters patent of 1853 be also effectual for their purpose? The answer is that the letters patent of 1847 were effectual, because they exercised the power of revocation reserved in the previous letters patent, and thereby left the ground free for the Crown to act; but that as the mode in which the Crown acted, was to give Natal a legislature, the Privy Council have decided that, while that legislature existed, the Crown precluded itself from legislating, and therefore the applicants letters patent of 1853 were ineffectual to make law. I may, however, before parting with this subject, observe that the Crown alone (if such an expression is admissible) very possibly cannot affect the power of the Crown in Council; we know that it cannot affect its power of legislation in conjunction with parliament, and I apprehend that a distinction between the Crown, and the Crown in Council, may explain the order of the Crown in Council (June 19, 1850, 2 Moodie's Ordinances, 1861) issued to help the want of power in the Natal legislature created by the Crown simply, to enact the Ordinance No. 3, 1849. Those who urge that the clergy of the English Church in a colony are bound in law by reason of the principle of the royal supremacy, to yield obedience to a Bishop nominated by the Crown, however unsupported by

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the law of the colony the nomination may be, would, I apprehend, find it difficult to establish even to their own satisfaction, that the obligation was more than one in conscience. This is not the place for entering upon questions existing only *in foro conscientiæ*, but some observations on the legal aspects of the point will not be misplaced. In my recent judgment I cited a passage from *Comyns Digest*, which, with my immediately accompanying observations, I shall here repeat. Having mentioned that the Rolls Court judgment stated that "by the law of the Church of England the Sovereign is the head of the Church," I proceeded, "There is, I apprehend, no doubt but that the Sovereign of England is earthly head over the Church of England, not by reason of any law, but of a very elementary mathematical proposition, viz.—that the whole is composed of its parts, and the Church of England in England, being an estate of the realm, and therefore part of the realm or kingdom, the sovereign, as head of the kingdom, is head of the Church of England. Chief Baron Comyn (*Digest, Prerogative, D.* 17) says: By the statute 16, R. 2, 5 of *Præmunire* the Crown of England is subject to none, but immediately under God. And by the Statute 25, Henry VIII., C. 21, the kingdom of England recognises no superior under God but the King. And this was only a declaration of the common law, and *therefore* the King of England is *supremum caput ecclesiæ Anglicanæ*. I need hardly say that a voluntary association is not an estate of the realm." The sovereign's supremacy over the kingdom implies, probably, that the appointment to all offices having an existence in and by law, lies with the Crown, save as parted with by it. This has, however, no relation to, so called, offices in a voluntary association, any more than it relates to servants in one's household. Common law is the unwritten will of a nation. Statute law is the written will of a legislature. But law, whether written or unwritten, has jurisdiction because of its being law. It governs all to whom it is law, without any consent or contract by them. And this governing power of law, and the right in some men to exercise it or to require its exercise in their or others favor against others, independently of any contract or personal or pecuniary relations or the like with them, is jurisdiction. The rules of a voluntary association are not law, even to those who have voluntarily subjected themselves to them, because law governs irrespectively of there having ever been consent. The expression, Royal supremacy, is only another mode of saying that the sovereign of England has exclusive sovereignty within the dominions of the crown of England. This sovereignty implies that no law can be made without the sovereigns consent, and that the execution of the law lies with him through himself or through officers appointed by him, or otherwise appointed by law. The exclusiveness of the sovereignty implies that all others within his dominions (save certain representatives of his brother sovereigns) are his subjects, and that no foreigner has jurisdiction there. Both the sovereignty and its exclusiveness have reference to law. Law is the foundation and means and end of sovereignty. The royal supremacy affects clergy differently from laymen, only so far as the clergy are in a different sense members of any part of the constitution or realm, or have some power of making law which the laity have not. Neither of these conditions apply to the clergy of a voluntary association. The royal supremacy therefore affects them only as it does laymen, in their capacity as subjects. The applicant's letters patent are for any purpose before us a legal blunder. The Privy Council judgment in *In the matter of the Bishop of Natal* explains how the blunder was committed. The official persons who prepared them, confounding them with cases in which the letters patent were realities in law. The blunder is this: They assume either that the Crown can make law when it has parted with that power; or else that the Crown, a great legal institution, all whose organs, senses, and operations are law or non-existent, can appoint to a non-existent office in a non-existent community; non-existent I say *quoad* the law and therefore *quoad* the Crown. So far as the principle of the royal supremacy is connected with the Church of England in England, we may refer to the oath of the Queen's supremacy, administered at the ordination of clergy, to the 37th article of religion and to the first, second, and thirty-sixth canons, to ascertain its nature. The first of these, the oath, having been styled in the Rubric the oath of the Queen's supremacy, is immediately afterwards headed as the oath of the Queen's sovereignty, it is only directed to two points, the position that the Pope's excommunication or deprivation of princes authorises their deposition or murder, and that any foreigner has or ought to have any ecclesiastical or spiritual jurisdiction or the like, within the realm. This oath, therefore, only deals with the exclusiveness of the Sovereignty. With regard to the 37th article and the Canons, we find in addition to the rejection of the Pope's claims, only this proposition laid down throughout them, that the Sovereignty and the exclusive sovereignty, applies to the whole realm, to everything which is within the province of law as part of the realm, to "all estates of the realm," "in all causes" to the ruling "of all estates and degrees committed" to the Sovereign's "charge by God," and that the Sovereignty extends over the ecclesiastical part of the state as well as over the civil part. The 36th Canon says that "according to God the royal majesty is the only and supreme governor of this realm, and of all other dominions and territories of the same, as well in all spiritual or ecclesiastical matters or causes, as in secular," that is, the sovereign governs in ecclesiastical as well as secular matters and causes, in so far as they are connected with the government of his dominions. And just as this position does not apply to voluntary secular associations, so it does not apply to voluntary religious associations, save as it would to individual subjects, or to ordinary partnerships. It was argued here on behalf of the applicant, that by reason of his being a Bishop of the Church of England, and the respondent being a clergyman thereof, the applicant has upon implied contract or submission thence arising, a right to call upon this Court to enforce the jurisdiction over or against the respondent which is claimed here. The three decided cases which I

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have already referred to as having been examined at length by me, conclude I think this question, if indeed any authority were required upon the subject. In the judgment of the Court in the Eton College case Lord Campbell having stated that in a colony "the ministers of religion in communion with the Church of England, with the Church of Scotland, and with the Church of Rome in the absence of any imperial or colonial legislation on the subject are all upon an equal footing,' adds shortly after, "there is great difficulty in seeing that the Bishop of Christ Church in New Zealand has any jurisdiction except over those who voluntarily submit to his jurisdiction, and he really seems in this respect to be in the position of the titular bishop," &c.; so that though the clergy generally had been so lately before expressly referred to, no exception is made of them here, in reference to the Bishop's absence of jurisdiction. Then in *Long* vs. *Bishop of Capetown* the question of jurisdiction by contract or submission called for express decision, and the Privy Council held that on the documents and facts in the case, there was a contract or voluntary submission by the clergyman with or to the Bishop, but never suggest that the admitted fact of the relative personal position of Bishop and clergyman merely, would or could have created anything of the kind. And this did not arise from the point not being before the minds of the judicial committee. Lord Kingsdown, in stating the Bishop's defence, takes express notice of this plea, among others, that his, the Bishop's, sentences were issued with the power and authority of right belonging to him as Bishop of the Church of which Mr. Long was a priest (p. 459); and the judgment appears to me to dispose of that question in this manner (p. 462): "To what extent then did Mr. Long, by the acts to which we have referred, submit himself to the authority of the Bishop in temporal matters? With the Bishop's authority in spiritual affairs, or Mr. Long's obligations *in foro conscientiæ*, we have not to deal." The mode in which the result of a contract was arrived at is then stated, namely: Mr. Long's taking the oath of canonical obedience, and accepting from him a license to officiate and have the cure of souls within the parish of Mowbray, subject to revocation for just cause, and by accepting the appointment to the living of Mowbray under a deed expressly contemplated as one means of avoidance the removal of the incumbent for any lawful cause. It appears to me that here the Privy Council refers all questions connected with the relative positions of bishop and priest to the *forum conscientiæ*, with which they had not to deal. But if such a spiritual relationship could have created a contract, the Privy Council would, I apprehend, have had to deal with it. The third case, *In the matter of the Bishop of Natal*, is, however, the strongest on the point. There the parties concerned, were two Bishops of the Church of England, standing towards one another as metropolitan and suffragan respectively, the suffragan being consecrated and receiving his letters patent on those conditions, and the question of jurisdiction by contract or submission being one of the three questions to be decided, the Privy Council declares expressly that "there is nothing on which such an argument can be attempted to be put unless it be the oath of canonical obedience taken by the Bishop of Natal to Dr. Gray as metropolitan." "Nothing" less than something personal and direct between the two. There has been, of course, in the case before the Court now, no oath of canonical obedience taken by the respondent to the applicant. But even if there had been, the observations of the Privy Council next following this last passage would equally apply, "The argument must be that both parties being aware that the Bishop of Capetown had no jurisdiction or legal authority as Metropolitan, the appellant agreed to give it to him by voluntary submission," and of such an agreement *mutatis mutandis*, we should have *a fortiori* to say here, as the Privy Council say there, "we find no trace" of it. It is scarcely necessary for me to state that in all these three cases the bishops had been nominated by the Crown, and the relation of Metropolitan and Suffragan in the last case, was expressed to be created with considerable formality of words, and yet to use the last words in the judgment with reference to that point "we have already shown that there was no power to confer *any* jurisdiction on the respondent as Metropolitan," adding, "the attempt to give appellate jurisdiction to the Archbishop of Canterbury is equally invalid." Indeed the very idea that a merely spiritual *status* in each of two persons whom the law can only recognise as members of a voluntary association can occasion a contract in law between them, seems simply absurd. As, however, the question of implied contract is, I apprehend one as to which we have to take care lest, if resorted to in any such way as this, it may lead to very erroneous and oppressive results, it may be well to make some observations with reference to the nature generally of implied contracts. Lord Westbury in the, as far as I am aware, latest ecclesiastical case before the Privy Council, (*Murray and Burgers*, 36 L. J., P. C. 44) in giving the judgment (February 6, 1867) of the judicial committee, said, (page 48), "The Dutch Reformed Church in the colony of the Cape of Good Hope is a voluntary society, constituted and subsisting by mutual agreement. The regulation of its ecclesiastical affairs depends upon contract, and the authority of its governing bodies is derived wholly from the submission and agreement of the members, ecclesiastical and lay, which constitute the church or society." This, if I may say so with great respect, appears to me to be a healthy tone to adopt on the subject of contracts in religious communities which may affect men's consciences, and I cannot but think that this clear language of Lord Westbury which commends itself, I apprehend, to every manly and intelligent mind, may partly have been meant to dispose at once and for ever of some, I cannot but call it, *nebulous* matter on the subject in the Rolls Court judgment. It may, I apprehend, be safely laid down that there is never an implied contract between parties except in reference to some express contract or actual dealing between them, including, of course, in any person, those whom he represents or who represented him, and including also in the term

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*actual dealing*, the contact of the immoveable property of each, and the handling by either of the moveable property of the other. With this understanding an implied contract may, I apprehend, for almost every purpose, be defined to be an addition by the law to the terms or circumstances of an express contract or actual dealing between the parties If then there never is to be implied a contract except in the manner which I have mentioned, it follows that when no property is concerned, there never can be an implied contract between parties as between whom or their representatives there has never been in reference to the particular subject, anything but a claim on the one side and a refusal on the other. I shall refer by and by to some apparent exceptions to the rule, in the meantime I may mention some authorities which I think illustrate the point. In *Chitty on Contracts* (5th Ed. p. 18) Lord Holt is cited as saying "that the notion of promises in law is a metaphysical notion, for the law makes no promise but where there is a promise of the party," and Mr. Chitty continues "and perhaps after all the chief distinction between an express and an implied contract is the mode of substantiating it." "It is clear," he adds, "that for the purposes of pleading, there is no distinction between an express and an implied promise." From which it follows that whenever you can rely on an implied contract, you may in your declaration simply aver that the defendant has contracted with you to do that which you ask the Court to compel him to do, or to punish him for not doing; unless you can so declare, you have not an implied contract to rely upon. So Erle, C.J., in delivering the judgment of the Court of Common Pleas in the case of *Kennedy* vs. *Broun* (32 *L. J. C. P.* 137) says (p. 145) "A special contract differs from an implied contract only in the mode of proof," and shortly after "when the contract is proved, its incidents are the same whatever was the kind of evidence adduced for proof. If there is incapacity, words and implications are alike nullities, and no contract can result, but where there is no incapacity, and there are conflicting presumptions in respect of the *consensus* essential to create contract, there evidence of express words of clear meaning is decisive proof." Here the Chief Justice with the question of implied contract under his notice, speaks of "the *consensus* essential to create contract." What I am speaking of is, I think, further illustrated by a well-known railway case in the House of Lords *Peek* vs. *the North Staffordshire Railway Company* (32 *L. J. Q. B.* 241) where it was not doubted and it was shown to have been often decided that an implied contract, arising out of a dealing with a person who gives you notice of what his terms of dealing are, the implied contract that you accept those terms, was a special contract within the meaning of statutes requiring a special contract. So in *Alton* vs. *the Midland Railway Company* (34 L. J. C., P. 292) it was held that a master cannot bring an action against a railway company, for the loss of services by the injury of his servant, travelling on the railway on his master's business; the company's liability depending on an implied contract to exercise due diligence to carry safely, arising out of the express contract to carry, but which express contract was made with the servant and not with the master, though an action would have lain by the master against a stranger who had injured the servant, and where therefore the cause of action would not depend on contract, express or implied, but simply on a right to compensation for an injury occasioned by another's wrongful act. The only apparent exceptions to the rule as to implied contracts that I have been speaking of, which have occurred to me from the books, serve rather, I think, to prove the rule. They consist of certain cases as to funeral expenses, and the husband's liability for his wife. (Addison on Contracts, pp. 20, 1, 2, *Smith's Leading Cases*, notes to Manby *vs.* Scott.) But there the law implies a request or an agency, or a credit, or the like; in order to imply the contract it resorts to a fiction, in order that there may be a dealing from which the implied contract may arise. In truth by means of the fiction an express contract exists, not an implied one. And as to fictions, the rule is that fictions of law are never allowed to work prejudice or injury to an innocent party, *fictio legis neminem lædit, nemini operatur damnum vel injuriam.* (Best on Presumptions, S. 22.) And it would be, I apprehend, to injure an innocent person, to imply against anyone a contract in favor of another, who has no legal rights, and with whom the other has had no connection. It may be, however, that the *quasi contractus* of the Roman law is not precisely the same as the implied contract as usually understood. Mr. Paterson, in his book on English and Scotch law says (Index) that there is no difference between those laws on the subject. Pothier defines a *quasi contractus* as "the act of a person permitted by the law, which obliges him in favor of another, without any agreement intervening between them." The act referred to was, I apprehend, always one in respect of a specified person or property, and the obligation of a pecuniary nature (1 Pothier, p. 69; Voet 44, 7, 5). And *Voet* says, that though there was no agreement supposed, yet the law presumed that but for certain circumstances affecting the person in whose favor the contract is implied, such as absence, want of knowledge, or infancy, there would have been an agreement. It too would, therefore, depend on a fiction of law. In truth, the term *quasi contractus* seems to have been adopted for want of a better in cases in which one person had, without contract, come under a pecuniary obligation to another, from an act which was not a crime (Just., 3, 28). It appears to me, therefore, that both upon authority and principle, there is no ground for contending for an implied contract here except upon the assumption, which is for us impossible, of Natal being the legal territorial diocese of the applicant. One would, I think, have said, had it not been actually argued, that it was absurd to contend for the existence of a contract of any kind here, because, if such there were, the respondent must be deemed bound by contract to any person in episcopal orders whom he approached within what distance shall I say? But this *prima facie reductio ad absuraum* was, in fact, urged as an ecclesiastical principle. Part of the argument for the applicant was, following a portion of the Rolls

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Court judgment, and it is a proposition which, in itself, I am not at all disposed to object to, that colonial bishops stand towards the law as bishops in the early Christian Church did, before Christianity became the religion of the Roman Empire. Then "Christian antiquities" were referred to to show, as I understood, that the clergy in those early times rendered obedience to anyone who had episcopal orders. I thought that this ground was rather a dangerous one for the applicant's counsel to venture on, as I thought it likely that in such "antiquities" cases would be found in which the deprivation of a bishop by his metropolitan and brethren would have been then held in the Church, to have absolved the clergy from any allegiance to him, though in the civil courts of the empire the sentence might have been held "null and void in law." I observed during the argument that the statements so made as to the clergy's allegiance to all or certain bishops, were immaterial in and for this case, unless it could be shown that this allegiance was enforced in the courts of the empire. No instance of that was cited, but I have since myself discovered the report of a case connected with the very early Christian Church, which probably exemplifies how the courts of the empire would have dealt with such a matter. The case which I allude to occurred at Corinth, and is thus reported in Sacred History, Acts xviii, 12, "And when Gallio was the deputy in Achaia the Jews made insurrection with one accord against Paul and brought him to the judgment seat, saying, This fellow persuadeth men to worship God contrary to the law. And when Paul was now about to open his mouth, Gallio said unto the Jews, If it were a matter of wrong or wicked lewdness, O ye Jews, reason, would that I should bear with you, but if it be a question of words and names and of your law, look ye to it, for I will be no judge of such matters, and he drave them from the judgment seat." It was argued here for the applicant that it would be very inconvenient that there should be one rule of law in reference to those clergy who had licenses from a colonial bishop, and another for those who had not. It seems strange, however, that such an objection could be made in earnest, by any one acquainted with the most ordinary affairs of every day life. A., B., and C. are ordinary residents in any town or country; as long as no contract or other like relation exists among them, none of them has any authority over or in respect of the others, but the moment that such a contract arises, a legal right co-relative to it exists, enforceable to the extent of the contract, terminating with its bounds, and expiring when it has ceased; and does all this, I ask, occasion difficulties or anomalies in life? I may mention that there was an ecclesiastical case several years ago before the Privy Council, which affords a useful instance of an implied contract enforceable in law. The case is *Hughes* vs. *Porral* (4 *Moore's* P. C. 41). The contract there was enforced at the instance of the representatives of the Roman Catholic congregation of their Cathedral at Gibraltar, against their Bishop, to make him account for payments made to him in respect of religious rites and ceremonies, and the bishop's contract to do so, was implied from his accepting the office of chief minister of the Cathedral, and being paid a salary, and his acquiescence in the usage. There is a point connected with the exclusively ecclesiastical or spiritual nature of the questions raised by this case, which was urged upon us by the respondent in his argument, and which, though new in the discussion here of these cases, is, I think, well worth consideration. The Privy Council, in *In the matter of the Bishop of Natal*, go into a detail as to the effect of the legislation in the times of Charles I. and II, upon the power of the Crown to create ecclesiastical tribunals. The result seems to be this, that any power which the Crown had newly to appoint persons to exercise spiritual or ecclesiastical jurisdiction within any of the dominions of the Crown, must be deemed to have been dependent on the 18th section of the Statute I., Elizabeth, c 1. That this section was repealed by 16, Charles I., c. 11, which also prohibited the exercise of any jurisdiction by spiritual or ecclesiastical persons or judges, and that though 13, Charles II, c. 12, partially repealed the Act. of 16, Charles I., yet it did not repeal so much of it as concerned the erection of any court, like the High Commission Court, and it provided that the 18th section of the Act of 1 Elizabeth should remain repealed. "There is therefore," the Judicial Committee of the Privy Council say, "no power in the Crown to create any new or additional ecclesiastical tribunal or jurisdiction, and the clauses which purport to do so contained in the letters patent to the appellant" (the applicant here) "and respondent are simply void in law." Now, then, what Mr. Wills, the respondent here, urged upon us was this, that as this Court had no greater authority than the Crown which created the legislature which created the Court, could give that legislature, and as in the case before us, no question of municipal law, nothing connected with a *jus rerum*, or property, was in any way concerned, we were, in fact, sitting exclusively for the exercise of ecclesiastical or spiritual jurisdiction, deciding on just such a question as would have been brought before the old High Commission Court (*Hume's History*, appendix to reign of James I.), or at least before an ordinary ecclesiastical tribunal in England, and that, therefore, we were sitting as a tribunal, and exercising a jurisdiction such as the Privy Council have decided that royal letters patent issued under the Crown's prerogative, purporting to create or confer, are "in violation of the law as declared and established by that part of the Act of the 16, Charles I., C. 2, which remains unrepealed by the 13, Charles II., Stat. 2, C. 12, and are so far "simply void in law." The Privy Council had also said immediately previously "It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no established church." In other words, I apprehend, that, except with reference in some way or other to questions of property, or some other matter of ordinary municipal law, all ecclesiastical jurisdiction is merely voluntary. and therefore, except by way of contract, outside the law, and the courts of law. And I may observe further, and the respondent called our attention

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to it also, that in *Long* vs. *the Bishop of Capetown* the Privy Council take occasion to remark that a question of property was involved there, viz.—the endowments of the incumbency of Mowbray; what is said is this (p. 466)? "The suit in which this appeal is brought respects a temporal right, in which the appellant alleges that he has been injured; it calls for a decision as to the rights of property, and involves the question whether Mr. Long has ceased by law to be what in England is termed *cestui que* trust of funds of which the Bishop is trustee. Whatever else Mr. Long may by his conduct have done, we cannot hold that he has precluded himself from exercising the power, which under similar circumstances he would have possessed in England, of resorting to a civil court for the restitution of civil rights, and of thereby giving to such courts, jurisdiction to determine questions of an ecclesiastical character essential to their decision." And in an earlier passage it is said, as we have seen (p. 462): "With the Bishop's authority in spiritual affairs, or Mr. Long's obligations in *foro conscientiæ*, we have not to deal." And as the point connected with the acts of Elizabeth and of Charles I. and II. had been urged by Mr. Long's counsel in argument (p. 436), we may well suppose that these observations in the judgment referred to them. The Crown can, as we have seen, establish in a conquered or ceded colony any law or body of laws it thinks fit. But suppose that at the time of doing so there is an act of the Imperial legislature enacting that in no part of the Crown's dominions shall such or such a law, say slavery, prevail, and that the body of laws established by the Crown includes slavery, shall the Crown's proclamation have the power of defeating the Imperial Act, and establishing slavery in a part of the dominions of the Crown? No one will say so. For slavery, then substitute a tribunal with ecclesiastical jurisdiction, forbidden, we may assume, by the unrepealed part of the Act of 16, Charles I., C. 11, and how can the body of laws introduced by the Crown, defeat that Imperial Act? And can it make a difference, whether the forbidden law comes in singly and solely, or is incidental to something else? Directly by the Crown, or through a creature of the Crown? It might, perhaps, be contended that, where there is no established Church there can be nothing ecclesiastical within the meaning of the Act of 16, Charles I. But we have to remember that the word "spiritual" is also used, and the history of the time shows that it would be unlikely that the colonies would be overlooked. The 18th section of the 1 Elizabeth had authorised the Crown to appoint, by letters patent, persons to exercise all manner of spiritual and ecclesiastical jurisdiction within any of the dominions and countries of the Crown. Now we know that shortly before the passing of the Act of 16 Charles I. the American plantations had been looked to by persons discontented with the Church of England, as a place whither they would go for the free exercise of their religious opinions. The leaders of the Puritans were, we know, then on the point of leaving England for America, but were detained by the King's Government. We may observe too that the section of the Act of Elizabeth repealed by 16 Charles I. and 13 Charles II. is general as to the persons who might be appointed to exercise spiritual jurisdiction, nor, I apprehend, can we doubt but that under it the spiritual functions might have been included in the commissions of civil judges. It is unnecessary for me to come to any conclusion upon this question. I have, however, stated certain reasons for making me think that there is considerable weight in the objection. It is quite possible, of course, that there may be some mode of escaping from the difficulty, which would appear very simple when once known, but I cannot say that any such has occurred to me, nor that I have heard any such supported. The respondent in his full and comprehensive argument, presented to us many other topics bearing upon the case, and all of interest and importance, but not necessary for decision by me. I may observe, however, that in an argument for the respondent in a case like this a part of it almost necessarily assumes somewhat of an *ad hominem* kind. "If you the applicant" it is natural for a respondent to say "rely upon your letters patent, I, the respondent, am entitled to rely upon the Metropolitan's letters patent. If you, the applicant, rely upon analagous episcopal rights and powers in the Church of England in England, I, the respondent, am entitled to rely upon analagous archi-episcopal rights and powers in the same Church; the difference between us being, that the powers which I rely upon are by analogy of a higher class than the powers which you rely upon. It is idle for you to say that you have law and that I have not, or that you have analogy and I have not, I have just as much of both as you have; nay it is possible that, as you are acting on the attack and I on the defence, I have more of both or either than you. Of this kind too was the argument that if letters patent are effectual in law, those of the Bishop of Capetown, of 1847, have never been legally resigned, and therefore Natal has never been severed in law from a Capetown diocese. The argument is, as I have said, of the *ad hominem* kind. The Canons of 1603 were much referred to on both sides during the argument. We have to remember that the original canons were in Latin, nor is the English translation, as far as I am aware, of any legal authority, and it appears to me in many respects to take great liberties with the Latin. The Latin title states that the Canons are "to be diligently observed throughout each province as well Canterbury as York." These Canons received the Royal assent, but were never incorporated in an Act of Parliament. They have been held to bind the Clergy of the Church of England in England *Escot* vs. *Martin* (4 *Moore's P. C* 104, 139) but not to bind the laity (*Blackstone* 83) this anomaly arises, I should say thus, that the Clergy of the Church of England in convocation had, I apprehend, by common law, power to make canons legally binding on the Clergy, that whether or not the Clergy ever attempted to extend this power to matters of State, and of municipal rights, their doing so was prohibited by pre-reformation statutes, and that at the reformation, the assent of the Crown to canons was made requisite for their validity even as regarded the clergy, but otherwise

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the common law power seems not to have been affected (4 *Coke's Institutes* 322 323). The Church of England's convocation had of course never in law, any power beyond England. I may add that the canons of 1603 are sometimes referred to as those of 1604, and that Lord Brougham states in *Escot* vs. *Martin* (123-4) that he supposes that this arises from the change of style, the date being he thinks in January. During the argument I stated my doubts whether these Canons applied to the Church of Ireland. I had not then in mind the terms of the act of Parliament uniting England and Ireland, and giving the name of the United Church of England and Ireland to the Churches (39 and 40 George III., c. 67, Art. Y.) and this has probably a bearing on that point. We know, however, that the form of appointment of bishops of the Irish Church differs from that of those of England, being directly from the Crown not through the deans and chapters by *congé délire*, also that its convocations are not summoned and do not meet. That the Clergy Discipline Act (3 and 4 Victoria, c. 86) does not apply to it, and that the court of appeal there in ecclesiastical matters is still that of delegates, not the judicial committee of the Privy Council. It will, however, be said, and probably correctly, that since the act of union between England and Ireland there is no such thing in English and Irish law, as the 'Church of England" or the "Church of Ireland," but only "the United Church of England and Ireland," having its one set of laws for England and its other set of laws for Ireland. Be it so, still this seems to show all the more strongly that the United Church of England and Ireland cannot be and was never meant to be in legal identity elsewhere than in and for those countries respectively. A pair of horses harnessed side by side drawing your chariot is a useful, convenient, and becoming arrangement. But as each horse has his own organs and members, and those of the other would be superfluous to him, if you propose to do away with the side by side arrangement, and to put one horse upon the other, I doubt that you will persuade your hearers that your new-fangled scheme would even in theory, deserve any laudatory epithet, and its possibility in practice, they would probably question. The petition prays that the respondent be interdicted from officiating inthe Church of St. Peter's, in this town, and in any other of the churches or buildings set apart for the uses of the United Church of England and Ireland in Natal; but we have not been shown that there is any building in Natal so set apart, nor have the trusts of the Church of St. Peter been, in these proceedings, shown to us. In a late case we had the trust deed of St. Peter's before us, and we know that it was not in terms for "the United Church of England and Ireland" but for the "English Church," and one can, I think, feel little doubt but that the distinction was originally not undesigned. The best short definition of the English Church in such a colony as this that occurs to me to express my view in reference to it is that it is what the Church of England, or if you will, the English branch of the United Church of England and Ireland would be in England if not established by law, and if unaffected by the common or statute law of England. *Nil*, it will be said *agit exemplum quod litem lite resolvit*, that the definition is as difficult as the matter to be defined, but in truth the many alleged difficulties connected with the question are, except with reference perhaps to rights in property or trusts, much more speculative than real. No one, as far as I am aware, doubts that the English Church in a colony must, to be consistent with its title, maintain in and for itself the Faith, the Liturgy, and the Orders of the Church of England as contained and provided for in and by the book of her Common Prayer and administration of the Sacrament, &c. And as to matters of form or government not thus provided for, such of the members of the voluntary association, or of any branch of it, as can agree to associate, can settle them for themselves, as the Privy Council lays down in *Long* vs. *the Bishop of Capetown*; let them not wish to settle questions for any but those who will voluntarily accept their settlement *si enim voluntas prompta est, secundum id quod habet, accepta est, non secundum id quod non habet.* To conclude, we are called on in this application to place the respondent, and through him, or through the principle adecting him, all clergy of the English Church in Natal under the authority of the applicant as being a Colonial Bishop with Royal letters patent for Natal. To do so would be, in my judgment, to award very large jurisdiction to one, having in the title in which he claims it, no jurisdiction of any kind whatever, over or in respect of any person whomsoever. I should therefore refuse the application.

Mr. Justice PHILLIPS read his judgment as follows.—This matter comes before the Court in the form of an application made by the Very Rev. J. W. Colenso, Doctor in Divinity, by Letters Patent, of Her Majesty the Queen, dated November, 1853, created Lord Bishop of Natal, against the Rev. J. H. Wills, a Priest of the Church of England, for an interdict or inhibition of the Court re-training the respondent from officiating as such Priest in any church or building set apart for the use of, or belonging to the Church of England in this colony, until he applied for, or obtained the license of the applicant in such behalf. Upon the application a question arose, and a difference of opinion existed upon the Bench, as to whether the Court would deal with the prayer of the applicant under the form in which it was presented, or whether he should be referred to his action at law. The majority [my brother Connor dissenting] granted a *rule nisi* for the inhibition, and it is on the argument for making such rule absolute, that the facts and questions of this case come before us. From the conclusion to which I have arrived it is unnecessary for me to allude to so much of the respondent's argument as relates to the mode adopted by the Court of testing his own and applicant's relative position, by the summary proceeding of a rule, further than to remark, that respondent must now acknowledge he has suffered no disadvantage therefrom, but, on the contrary, has been enabled to place his whole case and answer before us in a simple, expeditious, and inexpensive manner. When the *rule nisi* was

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applied for I was satisfied to let it go upon the allegations of the applicant, that he was a Bishop of the Church of England, and that the patent of his creation as such appointed him to this colony and assumed to give him certain powers; and I felt bound to admit that *prima facie* his Letters Patent were valid, that he possessed the powers they assumed to give him, that it was within the scope of these powers to exercise a control over the priests and deacons of the English Church to the extent, at all events, he then claimed to exercise it, and that he had a *locus standi* to ask the Court if he possessed the right he claimed, and if he had, to establish it for him. As stated by his counsel, applicant relies solely on the facts that he is a Bishop of the Church of England, the only lawful Bishop in this colony, and that as such, by his Patent or otherwise, he has control and authority over the respondent as a priest or deacon of the same Church to the extent he claims it. The respondent denies that as such Bishop, either by virtue of his Letters Patent or otherwise, can applicant prohibit him from officiating in this colony without his license. Upon this the following questions arise: Do the Letters Patent confer upon the applicant the power, authority, and jurisdiction they purport to give him? Does the mere relationship of Bishop and Priest of one Church give the one the authority he claims over the other? Has the respondent by any act of his own submitted himself to the lawful authority of applicant? And (arising from the argument of counsel on the recent judgment of the Master of the Rolls) is this Court to exercise for and on behalf of the applicant the authority he claims? The two first questions have, I apprehend, already been definitely settled, and by a tribunal whose judgment this Court is bound to follow and adopt. The judgment of the Lords of the Committee of the Privy Council, in the case of the appeal of the Rev. Mr. Long, from the Supreme Court of the Cape, and in the case of the petition of the Lord Bishop of Natal, have decided that the Letters Patent of the Crown are insufficient to create any ecclesiastical jurisdiction within a colony having legislative institutions of its own. I may remark upon this, that when the present Letters Patent of the Bishop of Cape Town were issued, the Colony of the Cape of Good Hope enjoyed a Constitutional Government, that is, the Legislative Council there was an elective body; whereas, when the Letters Patent of the Bishop of Natal were issued, the Legislative Council of this colony was composed of simply two or three members nominated by the Crown. This great difference in the constitutions of the two colonies does not, from the report I possess, appear to have been argued or brought under the notice of the Privy Council upon the petition of the Bishop of Natal —although, when delivering judgment on the Rev. Mr. Long, some stress was laid on the fact of the Cape enjoying a *constitutional* government, when the Letters Patent of 1853 were issued to the Bishop of Cape Town. Whether this, if brought prominently forward, would have attracted notice or not, I need not speculate on. I must accept the decision of the Privy Council as I find it, *that the Crown* had no power, by Letters Patent, to give to the Bishop of this colony a coercive ecclesiastical jurisdiction, and must, consequently, hold that the Letters Patent gave the applicant no control or authority whatsoever over the respondent. The cases I have above referred to, and now so well known, that it would be mere waste of time extracting from them, have also decided that the ecclesiastical jurisdiction which a Bishop of the Church of England possesses within his bishopric over a priest officiating in the same, is confined to England alone, or such colonies where the church is established by law, as a part of the constitution, and cannot be carried by bishop and priest, or priest and layman from the mother country to a new settlement. Therefore, as bishop of the English Church, the applicant can have no authority or control over the respondent, as a priest of the same church, beyond that which they mutually agree to. And this brings me to the question, has the respondent voluntarily submitted himself to the jurisdiction of his ecclesiastical superior, the applicant? If the case of the appeal of the Reverend Mr. Long was alone before me, I should hesitate before arriving at the conclusion that in the present case there is nothing from which I can infer that the respondent had consented to yield, while in this colony, obedience to all the requirements of its Bishop. True it is, that in Long's case the applicant had taken the oath of canonical obedience to the Bishop of Cape Town, had accepted his license to officiate as a priest in his diocese, and had been inducted into a living, subject to a removal by his Bishop for lawful cause. That these were direct and specific acts, producing, as strongly as words spoken could, a voluntary submission to "consensual jurisdiction," and that in this case no such direct and specific acts can be adduced against respondent. But, may it not fairly be argued, that when respondent entered into the Church of England, he impliedly contracted, and that it was an implied condition of his ordination into the priesthood to obey the lawful commands of the Bishop in whose diocese he should for the time being officiate? Nor is there any thing contained in the judgment on Long's appeal which precludes me from saying, that had there been no evidence of direct contract and submission upon which to reply, yet, from the mere fact of ordination to the priesthood of the English Church, the Court of the Cape Colony might have found, and the Privy Council might have confirmed a voluntary submission to episcopal jurisdiction. But the later case of the position of the Bishop of Natal precludes such views and arguments, although therein it was found and noticed that the Bishop of Natal had accepted his Letters Patent expressly subject and subordinate to the See of Cape Town, and the Bishop thereof, and had taken an oath of canonical obedience to such Bishop, as Metropolitan. It was, nevetheless, declared that the Bishop of Capetown thereby obtained no jurisdiction by contract or voluntary submission over the Bishop of Natal. How then, therefore, can I now say that, because respondent entered into and was ordained a priest of the Church of England, he contracted with, and voluntarily submitted himself to the jurisdiction of the Bishop of that Church? Can the oath of canonical

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obedience be binding between the priest and the Bishop, yet not between the Suffragan and the Metropolitan? I find it difficult to reconcile the two decisions, and therefore I must take it that the latter overrules the former. I now take up the question as it is supposed to be left by the Master of the Rolls, *i.e.*, that the functions and powers of a Bishop of the English Church are alike in the mother country and the colonies, save in this,—that in the colonies he is deficient in executive power, but can remedy this by calling on the civil courts to carry out his decrees. I don't think I mis-state this dictum of Lord Romilly's, or give it a greater breadth than it was intended to have. I refer to the following passages of his judgment *in re* Colenso *v.* Gladstone and others: —"In other words, the Bishop of Natal can exercise all the duties and functions, and perform all the acts which belong to a Bishop, within the diocese of Natal, that he could if he were the Bishop of an English diocese, with this exception, that he cannot enforce execution of his orders without having recourse to the civil tribunals for that purpose." "The more I have considered this question, which I have done very carefully, the more I have found myself at a loss to understand why the duties and functions of the Bishop remain in every respect the same, the fact that in order to enforce obedience to his rules, and to remove obstructions interposed to impede his actions, he must have recourse to the secular arm instead of enforcing it by his own power, that is, by officers of his own court, in any degree affects his status as a Bishop." Now, if this is the law, every step that the Bishop of Cape Town took in accordance with the canons and regulations of the Established Church in England, and the principles of justice in the cases of Long and the present applicant, was good and valid up to and including judgment, independent of the question of "consensual jurisdiction." If this is law, the doctrine of jurisdiction by consent, upon which such stress was laid by the Privy Council in both cases, is an immaterial thing. If this is law, the coercive jurisdiction of the Bishop, which every authority goes to repudiate, can by a mere form, nay, a fiction, become a practical and existing power. If this is law, a colonial Bishop has the right to constitute courts; he has a right of citation to them, a right to compel the attendance of witnesses; he has but to proceed according to the custom of the ecclesiastical courts in England and the principles of justice, and this Court is bound to erect such his *forum domesticum* into a State tribunal. With every respect for the learning and high position of the Master of the Rolls, I cannot accept, as law binding on this Court, the principles he appears to me here to have laid down. If a Bishop of the English Church in this colony, where the Church has confessedly and really no status, is to be clothed with a coercive jurisdiction, it must be by the legislature, and not by this Court. In the present application the applicant has confined himself solely to his position of Bishop. Had he, as registered owner and trustee in possession of the several churches standing in his name in this colony, asked for support in the exercise of his functions as owner and trustee as to how and by whom such churches are to be enjoyed and tenanted, I should have felt little difficulty, if any, in saying this Court should support the applicant in restraining the indecent intrusion of which he now in effect complains. But I must take the application as it is made, and administer the law relating to it as I believe it exists, and under this I can give the applicant no relief. Taking up the questions as I found them left by the decisions of the Privy Council, it has become unnecessary for me to consider so much of the respondent's able argument as did not relate to those decisions. I would, however, just notice that the respondent in some measure leaned upon the license of the "Metropolitan of the Province," and he argued that if any license was required such an one was sufficient; but the license so relied upon (supposing it sufficient, which I am hardly prepared to admit,) was in fact not the license of the Metropolitan, but of his Vicar General, and the position, power, and status of the latter in the English Church, or in this colony, was not even referred to by the respondent, and with this observation I leave it. *Rule nisi* discharged.

JOHN BROWN *vs.* THOS. BOND & CO.

Mr. WALKER, for Mr. Brown, who some short time since obtained a provisional order for the compulsory sequestration of defendants' estate, asked that the matter might again stand over till the first day of next term.

Mr. BUCHANAN, appearing for Messrs. Fass, Adler, & Escombe, said that he had instructions to intervene and press for the confirmation of the order.

Mr. WALKER under these circumstances was compelled to move for the confirmation of the provisional order.

The COURT granted the order, and the estate was accordingly sequestrated for the benefit of the creditors.

WISE *vs.* WISE.

Mr. SHEPSTONE applied for the first default and second summons in the above action, for divorce, and put in *Gazette*, &c.

The Court granted the second edictal summons returnable on the last day of next term.

MAYOR AND COUNCILLORS OF DURBAN *vs.* GEORGE BISHOP.

Mr. SHEPSTONE applied for second default and second summons by edict.

The Court granted the second summons returnable last day of next term.

LILLIS *vs.* LILLIS.

In this action for divorce Mr. Walker applied for the extension of the return day of the summons so that personal service might be effected.

The Court extended the return day to the last of next term.

R. B. JONES *vs.* JOHN FORBES.

Mr. SHEPSTONE applied for a decree of civil imprisonment against defendant.

Mr. WALKER made a technical objection, which was overruled, and then put in his own affidavit that defendant was out of employ at present, and that after the 1st September he would pay £1 per month if in work.

It appeared that the judgment was to restore

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certain oxen or their value, and neither had been handed over to the plaintiff.

The Court under those circumstances granted the decree as prayed.

*In re* PRINCE ALFRED HOTEL COMPANY.

Mr. WALKER read the report of the Official Manager, Mr. G. C. Cato, in the matter of the winding up of the above company. From the report it would seem that the accounts and papers, &c., were kept in a very careless and negligent manner. The Trust Deed was lost, and it was very difficult to ascertain who were or were not shareholders.

The Court fixed the amount of the security which Mr. Cato was to give at £500.

*In re* COLONIAL LAND COMPANY.

Mr. SHEPSTONE presented the report of Mr. Behrens, the manager of the Natal Land and Colonization Company (Limited), and as such appointed Official Manager of the above company. The Court fixed the amount of security to be given by Mr. Behrens at £1000.

ESTATE OF MARITZBURG AUCTION COMPANY.

In this matter Mr. SHEPSTONE appeared for the trustees asking the Court to order Francis and Fraser to deliver up all books and papers to the trustees. The application had stood over from the day before to allow Mr. Walker to produce an affidavit and the Deed of Assignment then referred to.

Mr WALKER now put in the affidavit of Wesley Francis, one of the partners in the new Auction Company, averring that the books had been handed to the respondents, under, and by virtue of a Deed of Assignment under which the respondents were to liquidate the affairs of the company in a way that he thought would have resulted in perfect solvency. Mr. Walker said that his clients only wanted an order to authorise them to deliver up the books.

The Court ordered the books to be given up to the trustees, access to be allowed to Francis and Fraser.

*In re* ZEDERBERG'S ESTATE.

Mr. SHEPSTONE applied on behalf of Major Armstrong, a mortgagee in the above estate, for an order attaching, for the payment of interest due on the bond, certain rents accruing from the property mortgaged.

Mr. WALKER appeared for the trustees, and argued that there was no arrangement that rent should be appropriated in payment of interest, and that the mortgagee could only call on the trustee to sell, but could not attach rents.

Mr. SHEPSTONE called the attention of the Court to two precedents in which rents had been ordered to be paid over to bondholders on account of interest.

The Court granted the order, and gave costs against the trustees, to be paid out of the estate.

ESTATE PEARSON, DECEASED.

Mr. SHEPSTONE appeared in the above matter, in which the executor asked leave to mortgage the immovable property in the estate to pay the debts due by the deceased. It had been referred to the Master for report, and Mr. S. now read it. The Master recommended that, under the circumstances, it would be better to mortgage the immovable property for £250, bearing interest at 10 per cent. per annum, than to realise movable property.

The Court granted leave to the executor to mortgage the property for £250, at 10 per cent. interest,—the money so raised to be applied in payment of the debts due by deceased.

*In re* M. C. E. RICHTER'S ESTATE.

Mr. SHEPSTONE moved for the confirmation of the first and final account and plan of distribution in this estate.

The Court confirmed the same, and ordered proceeds for distribution.

ESTATE G. WALKER.

Mr. SHEPSTONE also moved for the confirmation of the first and final account and plan of distribution in the above estate, and the Court confirmed the same.

ESTATE W. GUSH.

Mr. WALKER applied for the confirmation of the liquidation and distribution account in the above estate.

Mr. SHEPSTONE opposed, on behalf of Mr. C. B. Trollope, a creditor for £202 11s. 9d. The claim was for rent, and should have been ranked as preferent, whereas the trustee had only ranked it concurrent.

Mr. WALKER put in the affidavit of A. Martin, trustee, that he believed that, as Mr. Trollope had not interdicted the removal of property until his rent was paid, he had lost his preference.

The Court ordered the trustee to amend the account, and give a preference over the proceeds of the movable property for the rent for one year and any part of a year. Costs to be paid out of the estate.

Account confirmed on amendment being made.

The Court then rose.

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